Supreme Court, U.S.
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No. 93-

In the Supreme Court
OF THE
United States

October Term, 1993

JAMES H. STANTON, WINNIFRED STANTON, and their marital community, and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

vs.

BAYLINER MARINE CORPORATION,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED FOR REVIEW

In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), this Court ruled that admiralty law does not afford a remedy against the manufacturer of a commercial ship for defects which cause only economic loss. This Petition presents the following questions for review:

1. Does East River apply to recreational boats which are mass-produced and sold through local dealerships to consumers who cannot negotiate with respect to the manufacturer's liability for manufacturing defects?

2. If East River applies, are state legislatures barred by the uniformity doctrine of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), from providing local consumers a remedy against the manufacturer for defects which cause only economic loss?

3. Can a state product liability statute of general application be preempted merely because the state

legislature did not refer specifically to maritime claims, without considering whether there is any federal interest in uniformity of law as to the rule of East River?

LIST OF PARTIES

Petitioners are James H. Stanton and Winnifred Stanton and their marital community, Stanton Investment Company, Inc., and Albany Insurance Company. The respondent is Bayliner Marine Corporation ("Bayliner"). Olympic Boat Sales, Inc. was the only other party in the lower court proceedings.

RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Stanton Investment Company, Inc. is not related to any other corporation. Albany Insurance Company is a wholly-owned subsidiary of GRE Insurance Group. The other subsidiaries of GRE Insurance Group have no relationship to Albany Insurance Company except for being owned by a common parent.

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No. 93-__

In the Supreme Court
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JAMES H. STANTON, WINNIFRED STANTON, and their marital community, and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

vs.

BAYLINER MARINE CORPORATION,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in these proceedings on March 10, 1994.

JURISDICTION IN THE COURTS BELOW

Petitioners brought this action in the Superior Court for the State of Washington in King County, which exercised subject matter jurisdiction under Revised Code of Washington (RCW) 2.08.010 and in personam jurisdiction under RCW 4.28.185. The court of appeals exercised jurisdiction over petitioner's appeal pursuant to RCW 2.06.030 and RAP 2.2(a)(1). The Washington Supreme Court exercised jurisdiction over respondent's petition for review under RCW 2.04.010 and RAP 13.4(b).

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In separate transactions, James H. Stanton and Wiley Dean Henry purchased recreational boats which were manufactured by Bayliner and sold through Olympic Sales,

Inc., doing business as Olympic Boat Centers. Both vessels were insured by petitioner Albany Insurance Company. Both vessels sank due to an alleged manufacturing defect. No one was injured in either incident. Albany paid its insureds under their respective policies and became subrogated to their interests.

Albany and Henry brought an action against Bayliner and Olympic Boat Sales to recover for the cost of Henry's boat. The complaint alleged breach of warranty as well as products liability and negligence. The latter theories have been unified into a single cause of action under the Washington Product Liability Act (WPLA), RCW §§7.72.010-060. The WPLA has been construed in non-maritime matters to permit recovery for economic loss when a product fails in such a way as to present an unreasonable risk of harm to the user, whether or not the user is actually injured.

The Stantons brought a separate action which was identical to the Henry action in all respects except that it included a claim for loss of certain personal property on the Stanton boat. The actions were consolidated for trial.

The trial court granted summary judgment that petitioners' claims against both defendants under the WPLA were barred by East River, and that petitioners' warranty claims against Bayliner were barred under state law because petitioners and Bayliner did not have privity of contract. The trial court dismissed substantially all of petitioners' claims against Bayliner[1] and certified its ruling as a final, appealable order.

The court of appeals reversed and remanded for trial on the merits. Stanton v. Bayliner Marine Corp., 68 Wn. App. 125 (1992). The court held that petitioners' product liability claims were cognizable in admiralty jurisdiction, and

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[1] The trial court's ruling left intact the Stantons' claim for loss of personalty which was not equipment or furnishings of their vessel, and petitioners' claim against the dealer, Olympic Boat Centers.

assumed without deciding that East River applied despite the fact that petitioners' claims involved recreational boats. However, the court of appeals held that the WPLA could apply under Kossick v. United Fruit Company, 365 U.S. 731 (1961), "[b]ecause a significant state interest is at stake, and because its application would not unduly disrupt the uniformity of federal admiralty law." 68 Wn. App. at 131, A-22. The court held further that the WPLA could apply because it is a unification of contract and tort elements of product liability, and the contract claims are governed by state law in any event. Bayliner's petition for reconsideration was denied without opinion.

Bayliner's petition for review was granted by the Washington Supreme Court on March 31, 1993. The supreme court reversed the decision of the court of appeals in a 5-4 decision filed on December 30, 1993. The court ruled that East River applies to recreational as well as commercial vessels and precludes recovery for economic loss

in any action cognizable in admiralty which is brought in state court under the Savings To Suitors Clause, 28 U.S.C. §1333. The court agreed that Washington has a significant interest in allowing recovery for economic loss when a product fails in such a manner as to present a significant risk of harm to the user. However, the court stated that where there is an actual conflict between state and admiralty law, Kossick is inapplicable and state law is preempted regardless of the nature or weight of competing state and federal interests as to which law should be applied. The dissenting justices stated that East River does not preclude recovery for economic loss with respect to recreational boats as distinguished from commercial ones, and that even if it did preclude recovery in admiralty, the federal interest in uniformity as to the rule of law in question must be balanced against the state interest in having its law applied. Since the federal interest in denying recovery to recreational boaters is weak, and there is a strong state interest in providing a

remedy in order to deter the manufacture and dissemination of unsafe products, the dissenting justices would have remanded the case for trial on the merits.

Petitioners filed a petition for reconsideration on January 18, 1994. The petition was denied without opinion on March 10, and the mandate of the Washington Supreme Court was issued on March 14.

The following opinions are reprinted in the Appendix: the decision of the superior court dated October 9, 1990 (A-1 - A-6); the decision of the court of appeals filed August 17, 1992 (A-7 - A-23); the decision of the Washington Supreme Court dated December 30, 1993 (A-24 - A-77); the Order Denying Motion for Reconsideration dated March 10, 1994 (A-78 - A-79); and the Mandate of the Washington Supreme Court dated March 14, 1994 (A-80 - A-82).

JURISDICTION OF THE SUPREME COURT

Petitioners seek review by writ of certiorari of the decision filed by the Supreme Court of the State of

Washington on December 30, 1993, under the captions James H. Stanton, Winnefred Stanton, et al., Respondents, v. Bayliner Marine Corporation, Petitioner, and Olympic Sales, Inc., Defendant, and Albany Insurance Company, Respondent, v. Bayliner Marine Corporation, Petitioner, and Olympic Sales, Inc., Defendant, No. 60031-7, reported at 123 Wash.2d 64 (1993). The petition for reconsideration was denied and the decision of the Washington Supreme Court became the decision terminating review in that court on March 10, 1994. The Mandate of the Washington Supreme Court was issued on March 14, 1994. This Petition for Writ of Certiorari invokes the jurisdiction of the Supreme Court under 28 U.S.C. §§1254(1) and 1257.

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED

This Petition for Writ of Certiorari involves the question of how the Washington Product Liability Act should be applied in light of East River and numerous decisions by this Court concerning the accommodation of federal and

state interests in matters falling within federal admiralty jurisdiction as granted in Article III, Section 2 of the United States Constitution and implemented by 28 U.S.C. §1333.

STATEMENT OF THE CASE

I.

INTRODUCTION

This Court ruled in East River that admiralty law did not afford the charterers of four 225,000-ton supertankers a remedy against the manufacturer in tort when turbines in the vessels' propulsion systems failed in such a way as to injure only themselves, causing only economic loss. The Court reasoned that contract remedies were adequate for commercial transactions of the sort involved in that case, because the parties could set the terms of their own agreement.

The Washington Product Liability Act (WPLA) created a single cause of action for product-related harms which preempts previously existing common law theories of

product liability. Washington Water Power v Graybar Electric Co., 112 Wn.2d 847, 855-56 (1989) (*en banc*). The WPLA provides recovery against manufacturers and sellers for "any damages recognized by the courts of this state: Provided, that the term 'harm' does not include direct or consequential economic loss under Title 62A RCW." RCW 7.72.010(6) (emphasis in the original).[2] In Graybar, a non-maritime case, a manufacturer argued that the term "economic loss" should be construed under RCW 7.72.010(6) in the same manner as in East River, to exclude recovery for "all damages attendant to the failure and loss of use of a product." 112 Wn.2d at 860. The Washington Supreme Court specifically rejected the East River approach on the ground that:

> The Court's analysis in East River, we believe, unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects. For this reason, we find East River's approach to economic loss

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[2] Title 62A is the section of the Revised Code of Washington pertaining to the law of sales.

> unsuited to what the legislature intended under the WPLA.

Id. at 864 (citations omitted, emphasis added). The court therefore held that damages attendant to the failure or loss of use of a product are recoverable under the WPLA when the product fails in such a way as to create an unreasonable risk of harm to the user, regardless of whether the user is actually injured. Id. at 867.

Notwithstanding its decision in Graybar, the Washington Supreme Court held in this case that when a recreational boat fails on navigable waters, but the passengers escape injury, the boat owner is barred by East River from recovering from the manufacturer for the cost of repairing or replacing the boat. The court failed to consider whether there are any differences between recreational boaters and commercial shipping interests which make the policies of East River inapplicable. The court also failed to consider whether there are any federal interests in uniformity which would prevent the application of state law

to petitioners' claim. The court concluded that state law is preempted without regard to the presence or absence of such interests whenever it conflicts directly with a rule of admiralty law.

Every year, thousands of consumers purchase recreational boats from dealerships in the state of Washington and elsewhere in the same manner as they would purchase automobiles and other consumer goods. The boats range from expensive yachts to small sailing boats, outboard motorboats, and even such things as jet skis, rubber rafts, and sailboards. Such consumers have neither the opportunity, bargaining power, nor the sophistication to negotiate with respect to the warranty provisions of their purchase agreements. At best they are likely to have only a generalized understanding that they are protected by whatever laws the state may have passed to protect consumers from defective products. Under the decision of the Washington Supreme Court, however, recreational

boaters are singled out from other consumers and deprived of the protections of their state's product liability act because of a decision by this Court concerning commercial shipping interests which are completely foreign to them. Such a result is unconscionable and must be reversed.

II.

FACTUAL BACKGROUND

In December 1985, James Stanton and Winnifred Stanton purchased the MOONRAKER for $225,342. In April 1988, Wiley Dean Henry purchased the CONTESSA for $251,548.70. The two boats were identical in design and construction, each being a 45-foot model 4550 Bayliner motor boat. That particular model was designed and manufactured by Bayliner for recreational use, and each boat was purchased solely for recreational purposes.[3]

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[3] The Stantons placed title to their boat under the name of their company, the Stanton Investment Company, for reasons unrelated to this litigation. The ownership, operation, or use of the boat was no part of the business of the Stanton Investment Company, and it is conceded that the boat was purchased solely for recreational purposes.

Each boat was purchased from Olympic Boat Centers in Seattle, Washington. The sales contracts for the two boats were on identical pre-printed forms, despite the fact that the sales occurred more than two years apart. Both boats were insured by petitioner Albany Insurance Company.

Each boat struck an underwater object and sank in navigable waters while on a pleasure cruise. The MOONRAKER struck a submerged rock near Mats Mats Bay in Puget Sound. The CONTESSA struck a reef near Comax Air Force Base, Vancouver Island, Canada. Each boat was determined to be a constructive total loss. Albany reimbursed the Stantons and the Henrys according to the terms of their policies and became subrogated to their interests in the boats.

The facts of these cases illustrate well the state's concern for the hazards to which consumers may be exposed by defective products. When the vessels grounded their keels were penetrated in such a way as to produce sudden and

massive flooding. The skippers of both boats sent out distress calls on marine band radio as their vessels began to sink. The MOONRAKER sank in 12 minutes, according to the testimony of Mrs. Stanton. Its passengers were fortunate that there were other boaters nearby who could rescue them before their boat sank. The passengers on the CONTESSA had to be rescued by a marine helicopter dispatched from Comax Air Force base. They were fortunate that their vessel grounded on rocks which prevented it from sinking rapidly like the MOONRAKER.

The facts also illustrate the state's interest in deterrence. In the courts below petitioners submitted an affidavit from a naval architect who would have testified that the groundings experienced by the MOONRAKER and CONTESSA are a relatively common occurrence which should have been anticipated by Bayliner, and the mass floodings which occurred or those boats resulted from a design defect in the Bayliner Model 4550 which could easily

have been corrected by the use of relatively inexpensive design techniques such as installing foam or a similar substance inside the keel and capping the keel with fiberglass.

The Washington Supreme Court held nevertheless that East River bars states from protecting their consumers in the manner provided by the WPLA, merely because the goods in question were boats which failed on navigable waters. There is nothing in the facts or holding of the East River decision, the needs of the recreational boating industry, or the maritime doctrine of uniformity, to require such a result.

REASONS FOR GRANTING THE WRIT.

I.

THE WASHINGTON SUPREME COURT ERRED IN RULING THAT EAST RIVER APPLIES TO CONSUMER AS WELL AS COMMERCIAL PRODUCTS.

A. A Need Exists to Eliminate The Uncertainty and Inconsistency Among Lower Courts As To Whether East River Applies to Recreational Boats.

In Sherman v. Johnson & Towers Baltimore, Inc., 760 F. Supp. 499 (D. Md. 1990), a suit was brought against the manufacturer by the buyers of a yacht destroyed by fire. The court recognized that the action was in admiralty jurisdiction, 760 F. Supp. at 500, but held that East River did not bar the plaintiff's tort claims, because East River does not apply when the purchaser of the defective product is a consumer. 760 F. Supp. at 502.

In addition to Sherman, there are several other decisions which interpret East River as being inapplicable to consumer goods. In Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752 (5th Cir.

1989), which held that East River applies to contracts for professional services rendered in connection with the manufacturing or construction of a product by a party other than the manufacturer, the court interpreted the rule of East River as being limited to commercial users as distinguished from non-commercial ones. 866 F.2d at 764-65. Similarly, in Richard O'Brien Cos. v. Challenge-Cook Bros., Inc., 672 F. Supp. 466 (D. Colo. 1987), the court held that provisions of state law similar to the rule of East River prevented purchasers of defective pumps from recovering from the manufacturers when the only loss was to the product itself. The court distinguished Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983, 989 (1975), which allowed recovery of similar damages by a non-commercial purchaser of a mobile home. Citing East River, the court stated that non-commercial plaintiffs can recover in tort for injury to the product itself, but commercial plaintiffs may not do so. 672 F. Supp. at 472 (emphasis added). Finally, in Consumers

Power Co. v. Mississippi Valley Structural Steel Corp., 636 F. Supp. 1100 (E.D. Mich. 1986), state law was held to bar recovery by the owners of a nuclear power plant from the manufacturer of component parts for economic loss resulting from manufacturing defects. The court distinguished between commercial and non-commercial transactions on the basis that "the argument to limit the parties to their contractual remedies is much stronger in the purely commercial setting than it is when consumer claims are involved." 636 F. Supp. at 1108. When the distinction between commercial and non-commercial transactions was challenged on motion for rehearing, the court cited East River as authority that the distinction is valid. 636 F. Supp. at 1112-13.

On the other hand, Karshan v. Mattituck Inlet Marina & Shipyard, Inc., 785 F. Supp. 363 (E.D.N.Y. 1992), and Lewinter v. Genmar Industries, Inc., 1993 AMC 939 (Cal.Super.Ct. 1993), hold that East River applies to

consumer as well as commercial goods. Karshan involved a suit by the owner and underwriters of a yacht against the seller to recover for property damage resulting from a fire on the yacht. The court held that the product liability claim was barred by East River even though the vessel was a consumer good. 785 F.Supp. at 365-66. Lewinter involved an action by the owner of a yacht against a remote manufacturer to recover for the value of the yacht after it sank because of defective lamination. The court held that the action was cognizable in admiralty, and the owner's negligence and strict liability claims were barred by East River despite the fact that there was neither privity of contract nor a "commercial relationship" between the owner and the manufacturer. 1993 AMC at 943-945.

In addition to Karshan and Lewinter, there are several other decisions which interpret East River as being applicable to consumer as well as commercial goods. In Simon v. Genmar Industries, 1989 AMC 2627 (S.D.N.Y.

1989), which held that the owner of a yacht had no claim under state law against the manufacturer for negligence which caused gelcoat blisters to develop on the hull, the court stated in dictum that East River would have mandated the same result if admiralty jurisdiction had been found to apply. 1989 AMC at 2629.

In Sisson v. Hatteras Yachts, 1991 WL 47543 (N.D. Ill. 1991), suit was brought for damages which resulted when the washer-dryer unit on a yacht caused a fire which destroyed that yacht and several adjacent ones. The owners of the yacht where the fire originated contended that East River did not bar their claim against the manufacturer of the washer-dryer unit for damages to their own boat, because they had no "commercial relationship" with the manufacturer. The court rejected that contention on the ground that East River applies to parties throughout the chain of distribution. 1991 WL 47543, p. 2. It appears from the opinion that the court considered only the application of

East River to parties not in privity of contract with the manufacturer. Nevertheless, both the Washington Supreme Court and the court in Lewinter rely on the Sisson decision as authority that East River applies to consumer as well as commercial goods.[4]

The Washington Supreme Court also cited several land-based cases which have interpreted East River as applying to consumer goods. Dairyland Ins. Co. v. General Motors Corp., 549 So.2d 44 (Ala. 1989) (East River was applied to deny recovery in tort to the buyer of a noncommercial van which caught fire and was destroyed while being driven); Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okla. 1990)(East River was

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[4] The Washington Supreme Court cited erroneously to Sisson v. Hatteras Yachts, 778 F. Supp. 959 (N.D. Ill. 1991), a later decision in the same litigation which had also been cited to them by respondent. That decision involved a suit by the underwriter of the yacht where the fire originated against the manufacturer as assignee of the claims of adjacent yachts destroyed by the fire. The claims were denied upon the basis of a factual determination as to the proximate cause of the fire. East River was clearly inapplicable, inasmuch as the suit was for damage to the property of third parties rather than economic loss.

applied to deny recovery in tort to the buyer of a mobile home for defective roofing); and Danforth v. Acorn Structures, Inc., 608 A.2d 1194 (Del. 1992)(East River was applied to deny recovery in tort to the buyer of a home building kit).

In all, the Washington Supreme Court cited seven cases in favor of Bayliner's contention that East River applies to consumer goods, and four cases in favor of petitioners' contention that it does not apply. The court then concluded that "On balance, the weight of authority interprets East River's maritime product liability rule as applicable to both commercial and consumer transactions." 123 Wn.2d at 79, A-50. Apart from referring to the opinions of some of the cases which it cited, the court made no attempt to analyze the considerations which led to the East River decision or determine whether those considerations apply to consumer goods in the same manner as to commercial shipping transactions. This Court should grant

certiorari in order to eliminate the confusion among the lower courts and provide a principled determination of whether the elimination of a tort remedy for economic loss is appropriate for recreational boats as well as commercial ships.

B. East River Does Not Apply to Recreational Boats.

The facts of East River have no relation to recreational boats. East River involved four 225,000-ton supertankers, each costing $125,000,000.00 at 1969 prices. Each supertanker was constructed by a sophisticated international shipping concern and then transferred to the plaintiffs under 20-year demise charters. The plaintiffs were sophisticated commercial entities which intended to use the supertankers in the worldwide petroleum trade. Petitioners, on the other hand, were unsophisticated consumers who purchased their boats from a dealership for recreational purposes in the same manner as a consumer would purchase an automobile or other consumer goods.

Moreover, the holding in East River does not purport to apply to consumer transactions. The Court defined the issue in East River as follows:

> [W]hether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation.

476 U.S. at 866 (emphasis added). See also 476 U.S. at 859, where the Court referred to products purchased "in a commercial transaction." The Court then stated its holding as follows:

> [A] manufacturer in a commercial relationship has no duty under either a negligence or strict liability theory to prevent a product from injuring itself.

476 U.S. at 871 (emphasis added). The Court referred to the case of Seely v. White Motor Company, 67 Cal.2d 9, 403 P.2d 145 (1965), which also involved a product purchased for

commercial use. There is nothing in the holding which refers to consumer products or their users or manufacturers.[5]

Finally, the rationale of the East River decision has no application to consumer goods. Although the term "commercial relationship" as used in East River is ambiguous, and could be construed to refer to any type of sales transaction, the reasoning of the Court indicates that the decision applies to products purchased for commercial use rather than consumer goods. The Court expressed concern for keeping product liability and contract law in separate spheres, 476 U.S. at 871. However, that concern was discussed in the context of transactions where there is a meaningful negotiation of the contract terms, so that there is no countervailing reason to intrude into the parties' allocation of risk. 476 U.S. at 872-873. The Court stated that:

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[5] Moreover, the Court in East River specifically declined to decide whether a tort cause of action could ever be stated in admiralty when the only damages sought are economic. 476 U.S. at 871, n.2.

> [W]hen a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased cost in performing a service.

476 U.S. at 871 (emphasis added). The Court then stated that public policy does not require the special protections of tort liability for commercial users, because:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case, because the parties may set the terms of their own agreements.

476 U.S. at 872-73 (emphasis added). The Court added that while warranty and products liability are not static bodies of law, and may overlap, "the latter seem to us far more appropriate for commercial disputes of the kind involved here." 476 U.S. at 873, n.8 (emphasis added). Citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the Court concluded that:

> Since a commercial situation generally does not involve large disparities in bargaining power, we see

> no reason to intrude into the parties' allocation of risk. 476 Us. at 873 (emphasis added).

Thus, the decision in East River was based in the Court's conclusion that in commercial transactions, the parties are able to protect their interests by setting the terms of their own agreements. That rationale has no application to the present case. Stanton and Henry, like most recreational boaters, were ordinary consumers who had no meaningful opportunity to set the terms of their transactions. The boats were mass-produced consumer goods which they purchased from a dealer pursuant to a standardized contract prepared by the manufacturer or seller. The buyers had neither the sophistication nor the opportunity to negotiate with respect to contract provisions which purported to define the scope of the manufacturer's liability.

The Court in East River also expressed concern for maintaining a realistic limitation on damages. 476 U.S. at 871 and 874. That concern is likewise inapplicable to consumer goods, because the lack of a commercial purpose

provides a built-in limitation on liability. With no loss of anticipated profits, the consumer's claim for economic loss will virtually always be limited to repair or replacement costs.

C. The Extension of East River to Recreational Boats Would Intrude Unduly Into Areas Where the States Should Retain the Power to Legislate.

In Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982), and Sisson v. Ruby, 497 U.S. 358 (1989), this Court held that admiralty jurisdiction extended to tort claims involving, respectively, a collision between pleasure boats on navigable waters and a fire on a yacht which damaged other yachts at a marina on navigable waters. In the present case the Washington Supreme Court equated jurisdiction with choice of law by reasoning in effect that since Foremost and Sisson were based in part on a need for uniform rules of maritime conduct, there is necessarily a need for a uniform rule whenever admiralty jurisdiction applies to cases involving recreational boats. 123 Wn.2d at 86-87, A-63 - A-

66. The Washington court read Foremost and Sisson much too broadly. This Court's power to fashion rules of admiralty law depends upon admiralty jurisdiction. By upholding admiralty jurisdiction in Foremost and Sisson, the Court preserved its power to fashion rules pertaining to recreational boats when necessary. However, the Court did not purport to require uniformity with respect to every issue involving recreational boats. In fact, admiralty jurisdiction under Foremost and Sisson extends to many cases which are sufficiently remote from traditional concerns of maritime commerce that the preemption of state law would improperly intrude upon the role of the states in our federal system.

For example, in Matter of Skyrider, 1990 WL 192479 (D.Hawaii 1990), admiralty jurisdiction was upheld in a case involving a fall by a parasailer. In Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981), admiralty jurisdiction was upheld when a wife brought suit against her husband for injuries she

sustained when her deck chair fell from the bridge of their pleasure boat. In Ratcliff v. United Services Automobile Association, 180 So.2d 58 (La. 1965), admiralty jurisdiction was upheld when a passenger brought suit for injuries caused by exposed metal studs on the boat's engine. Admiralty jurisdiction has been upheld in many cases of accidents involving jet skis. Calhoun v. Yamaha Motor Corp., 1993 WL 218833 (E.D.Pa. 1993); Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1992); Lipworth v. Kawasaki Motors Corp. U.S.A., 592 So.2d 1151, cert. den., 113 S. Ct. 465, 121 L. Ed. 2d 373 (1992); Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D.Fla. 1992); and Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11th Cir. 1990). Admiralty jurisdiction has likewise been upheld in many cases involving waterskiing accidents. Rubin v. Brutus Corp., 487 So.2d 360 (Fla. 1986); Hogan v. Overman, 767 F.2d 1093 (4th Cir. 1985); Blevens v. Sfetku,

66 Cal.Rptr. 486 (1968); and Isaacson v. Jones, 216 F.2d 599 (9th Cir. 1954).

Many of the foregoing cases involved injuries which did not implicate the issues addressed in East River. However, admiralty jurisdiction is likely to be upheld under Foremost, Sisson, and East River where the jet ski, parasail, motorboat or sailboard breaks down on navigable waters due to a manufacturing defect, causing only economic loss.[6] The fact that uniform federal rules may prove necessary for certain activities of such craft, such as navigational activities, does not mean that state law should be preempted in all respects. To hold that state product liability remedies are forbidden to the buyers of jet skis, sailboards, parasails, or motorboats, merely because the remedy under state law is inconsistent with East River, is an unwarranted usurpation

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[6] The Supreme Court held in East River that a product liability claim involving a commercial vessel which fails in maritime commerce on navigable waters is within admiralty jurisdiction. 476 U.S. at 863-64.

of matters as to which the states should also retain the power to act.

II.

THE WASHINGTON SUPREME COURT ERRED IN RULING THAT STATE LAW IS PREEMPTED WITHOUT THE NEED TO BALANCE STATE AND FEDERAL INTERESTS.

As discussed in Sections III and IV of this petition, infra, the Washington Supreme Court did not properly consider the competing state and federal interests in choice of law. Moreover, the court's very superficial discussion of state and federal interests is incurably tainted by its declaration of the legal standard to be applied in deciding the choice of law issue. The supreme court ruled that the WPLA's definition of economic loss is preempted as to maritime matters because:

> Although Kossick endorsed the notion of balancing local concerns against federal interests in some circumstances, it does not stand for the proposition that state law may displace conflicting federal law.

123 Wn.2d at 82, A-55 (emphasis in the original). The court stated further that:

> [I]t is Graybar's definition of "economic loss" which does not follow East River's analysis, that creates a conflict between the state and federal remedies. This conflict requires application of the federal admiralty rule of East River.
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> ***
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> [T]he court need not engage in "interest analysis" where there is a conflict between the state and federal remedies for economic loss; such conflicts are resolved in favor of federal maritime law.

123 Wn.2d at 83-84, A-58 - A-59 (emphasis added). These statements indicate that the Washington Supreme Court applied an improper legal standard in determining that state law was preempted.

This Court held in Kossick v. United Fruit Company, 365 U.S. 731 (1961), that an employer's agreement to assume responsibility for treatment received by a seaman at a Public Health Service Hospital should be judged by the admiralty rule permitting enforcement of oral contracts, rather than the state statute of frauds, because the contract

was one which could have been made anywhere in the world and should be governed by one law wherever made. 365 U.S. at 741. However, the Court specifically rejected the view that "wherever a maritime issue is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant." 365 U.S. at 739. The Washington court's conclusion that Kossick does not permit state law to displace "conflicting federal law" is inconsistent the statement in Kossick that:

> [T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of law situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.

Id. The "process of accommodation" referred to in Kossick would be meaningless if it occurred only in the absence of conflict between state and federal law, as held by the Washington Supreme Court. In fact, this Court has recognized in many cases that state law can be

accommodated when it stands in the same relationship to federal admiralty law as the definition of "economic loss" under the WPLA.

The uniformity doctrine enunciated in Jensen actually originated with Justice Bradley's opinion in The Lottawanna, 88 U.S. 558, 575 (1874); Southern Pacific Co. v. Jensen, 244 U.S. at 215. Ironically, the Court recognized in The Lottawanna that state-created liens for supplies furnished to a vessel in her home port could be enforced even though maritime law did not afford a lien, because Congress had not yet adopted a uniform lien statute and the state liens did not offend against the basic principles of maritime law. See also Peyroux v. Howard, 32 U.S. 324 (1833), and The Orleans, 36 U.S. 175 (1837). State law should be applied in the present case for the same reasons.

In The Harrisburg, 119 U.S. 199 (1886), this Court held that general maritime law did not provide a remedy for wrongful death. As a result, this Court held in numerous

cases that state statutes could be applied to provide a remedy for wrongful death in state territorial waters. The Hamilton, 207 U.S. 398 (1907); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). State wrongful death statutes were applied until Congress enacted legislation intended to create a uniform remedy for maritime wrongful death. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 230 (1986).

Likewise, the Court held in Just v. Chambers, 312 U.S. 383 (1941), that in the absence of a maritime rule providing for survival of causes of action, state survival statutes can be applied to maritime causes of action.

The Washington Supreme Court's conclusion that state law must be preempted whenever it conflicts with a rule of maritime law is a "destructive oversimplification of the highly intricate interplay of the States and the National Government in maritime commerce." Romero v. Int'l Term. Operating Co., 358 U.S. 354, 373 (1959). Justice Frankfurter acknowledged in Romero that "state law must yield to the

needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," 358 U.S. at 373. However:

> [T]his limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced their statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance - all these rules and others have been accepted as rules of decisions in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.358 U.S. at 373-74 (emphasis added).

Justice Frankfurter's statement was reaffirmed in Askew v. American Waterways, 411 U.S. 325, 338 (1973), which held that concerns for uniformity did not bar enforcement of a state statute imposing liability in excess of federal standards for oil-spill damage to the state or its

residents. The Court stated in Askew that Jensen and its progeny "have been limited by subsequent holdings of this Court," are "confined to their facts," and "mark isolated instances" in which state law must be preempted. 411 U.S. at 338 and 343.

The most recent application of the uniformity doctrine is American Dredging Company v. Miller, 114 S. Ct. 981, 61 U.S.L.W. 4130 (1994), in which this Court upheld the application of a Louisiana statute barring application of the maritime doctrine of forum non conveniens to maritime cases are filed in state court under the Jones Act or the saving to suitors clause. While Miller can be distinguished from the present case on the basis that the Louisiana statute was procedural rather than substantive, such a distinction would belie the much broader grounds upon which the case was decided. Citing Jensen, the Court stated that:

> The requirement of uniformity is not, however, absolute. As Jensen itself recognized: "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be

> changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." 114 S. Ct. at 986.

The Court concluded, citing Jensen and Madruga v. Superior Court of California, 346 U.S. 556, 561 (1954), that the Louisiana statute could apply because it did not:

> work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony of that law in its international and interstate relations. 114 S.Ct. at 985.

Thus, the Washington Supreme Court's holding that it "need not engage in interest analysis where there is a conflict between the state and federal remedies for economic loss", 123 Wn.2d at 84, A-59, is incompatible with the many decisions of this Court concerning the interplay between state and federal interest in maritime matters.

III.

THE WASHINGTON SUPREME COURT ERRED IN SUBORDINATING THE STATE'S INTEREST MERLEY BECAUSE MARITIME MATTERS WERE NOT SPECIFICALLY ADDRESSED IN A STATUTE OF GENERAL APPLICATION.

This Court stated in East River that "the charterers do not ask us to defer to the law of New Jersey, the forum State. Nor is the application of state-law principles required here. New Jersey lacks any pressing and significant interest in the tort action." 476 U.S. at 864, n.2. The reasons for the forum state's lack of interest stems from the nature of the transactions involved in East River. Such transactions are few in number and highly particularized. They are also unlikely to have a significant nexus with the forum state. The vessel is likely to be built and in another state or foreign country, employed in regions distant from the forum state, and crewed by seamen who do not reside in the forum state. Even if the buyer of the vessel is a local resident, it is likely to have enough sophistication, bargaining strength, legal and

technical assistance to protect its own interests with regard to product safety. In such circumstances the forum state has no pressing interest in intruding into the parties' contractual allocation of risk. In contrast, recreational boats are marketed and sold locally in large numbers. The buyers typically reside and use their boats in the state of purchase. They frequently lack the knowledge or bargaining strength necessary to protect their interests as to product safety. It has been recognized for many years that state legislatures have a significant interest in determining the extent to which local consumers require the protection of product liability laws. That interest applies with particular force to recreational boaters, because of the potentially disastrous consequences of a product failure in circumstances where the boaters' lives can be endangered.

The court of appeals recognized in the present case that the interpretation of "economic loss" under the WPLA could apply in lieu of the more restrictive interpretation in

East River "[b]ecause a significant state interest is at stake...." 68 Wn.App. at 131, A-22. The supreme court acknowledged in the present case that "the Court of Appeals properly concluded that Washington has a significant interest in a divergent interpretation of economic loss...." 123 Wn.2d at 74, A-39 (emphasis added). Although the court stated that "Washington's interest in providing a remedy for these plaintiffs does not outweigh federal interests in maritime uniformity," 123 Wn.2d at 84, A-59, and that "Washington does have an interest in preserving appropriate remedies for personal injury; the loss at issue in this case, however, is purely economic," 123 Wn.2d at 85, A-62, the court recognized thereafter that "The Graybar court ...found East River's approach unsuited to what the legislature intended under the WPLA....the Graybar court carefully analyzed the statute and concluded that the WPLA incorporates the risk of harm analysis." 123 Wn.2d at 85, A-62 (emphasis added). The Washington Supreme Court subsequently reaffirmed the

risk-of-harm analysis, and Graybar's rejection of East River, in Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc., 119 Wn.2d 334 (1992). As indicated in Graybar, the reason for incorporating the risk of harm analysis was to avoid injuries to consumers by deterring the manufacturing and dissemination of unsafe products. Graybar, 112 Wn.2d at 864. However, the court concluded in the present case that the state's "significant interest in a divergent interpretation of economic loss" was insufficient to withstand federal preemption in the absence of some showing that the legislature had considered and specifically intended for state law to apply in maritime as well as other matters. The court stated that "there is no indication by the Legislature or this court that Washington's interests in deterring the manufacture and dissemination of dangerous products outweigh the need for a uniform maritime law of products liability...there is no support for a rule of exception for economic loss in maritime products

liability cases based on Washington law." 123 Wn.2d at 85-86, A-62 - A-63 (emphasis added). The court gave no other reason why the state's interest should be subordinated to a need for uniformity, whatever that need may be in this case.

The court's analysis of the state's interest is exactly the reverse of what it should be. The question is not whether the state law creates an exception to maritime law, but instead whether and to what extent the needs of the maritime system compel an exception to state law. The court's holding places a wholly unrealistic burden on state legislatures to remember to address maritime matters specifically when enacting legislation for general application. It also creates a wholly unjustified need to resort to legislative history in order to determine the intention of the legislature when weighing state and federal interests in maritime matters. Finally, the court's reference to the absence of prior "indications...by this court" tends to deny recreational boaters their day in court by suggesting that a

factor in weighing the state and federal interests is whether the state court somehow discussed the relative importance of those interests before being called upon to decide that issue.

Thus, the Washington Supreme Court should have presumed that the legislature intended its law to apply to recreational boats because it is clearly appropriate for such products, and the legislature did not provide otherwise. In fact, the WPLA as construed in Graybar is particularly appropriate for recreational boats because boating is a popular recreational activity, and boaters are frequently in situations where their lives could be endangered if their boat were unsafe.

In Davis v. Department of Labor, 317 U.S. 249 (1943), this Court held that the widow of a steel worker who was drowned after being knocked from a barge into the Snohomish River could recover under the state workmen's compensation law. Citing South Carolina State Highway

Department v. Barnwell Brothers, 303 U.S. 177 (1938), which upheld enforcement of a state statute limiting the size and weight of motor trucks on state highways, the Court stated that state law is not automatically displaced by federal law, 317 U.S. at 254, and that where federal authorities have not determined that state law may not apply, the application of state law must be presumed constitutional. 317 U.S. at 256-57.

The presumption of constitutionality of state law is a general one which applies in all areas of overlapping state and federal interest.

> When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body, on which rest the duty and responsibility of decision. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to

> substitute their own for the legislative judgment.

South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. at 191 (citations omitted).

The presumption of constitutionality invoked in Barnwell and Davis applies as well to the present case. The Washington legislature has determined that in order for consumers who purchase goods within the state to be protected from the dissemination of unsafe manufacturing practices, a remedy must be provided for economic loss when the product fails in such a way as to create an unreasonable risk of harm to the user. There has been no determination by federal authorities that the application of the state law to recreational boats is unconstitutional.[7] Therefore, Washington law should apply absent a showing of a specific need for a uniform rule of federal law.

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[7] The Court in East River specifically stated that even in the context of commercial transactions, the issue of application of state law was not before it. 476 U.S. at 864, n.2.

IV.

THE WASHINGTON SUPREME COURT ERRED IN FAILING TO CONSIDER WHETHER THERE IS ANY FEDERAL INTEREST IN A UNIFORM LAW OF PRODUCT LIABILITY FOR RECREATIONAL BOATS.

A. State Law Remedies Are Not Barred As To Maritime Matters Merely Because A Remedy Is Unavailable Under Admiralty Law.

In Exxon Corp. v. Central Gulf Lines Inc., 111 S.Ct. 2071 (1991), the Supreme Court held that agency contracts are not per se excluded from admiralty jurisdiction. Citing Sisson v. Ruby, the Court stated that "the admiralty jurisdiction is designed to protect maritime commerce...the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it has gone to far." 111 S.Ct. at 2076-2077. Those considerations apply as well to the uniformity doctrine, which is but a consequence of admiralty jurisdiction and has the same purpose of protecting maritime commerce. In Davis v. Department of

Labor, this Court stated that Jensen requires a factual determination of whether application of the state law at issue would "interfere with the proper harmony and uniformity of maritime law." 317 U.S. at 254. In determining that there is a need for uniformity in the present case, the Washington Supreme Court did nothing more than allude to general statements by other courts about "the need for uniform rules of maritime conduct and liability...."123 Wn.2d at 86, A-63. The court made no attempt whatever to address the specific question of whether there is a need for a uniform rule with respect to the liability of manufacturers to consumers for economic loss.

In American Dredging Company v. Miller, supra, this Court upheld a state statute barring application of the federal doctrine of forum non conveniens to maritime cases filed in state court, because the federal doctrine of foreign non conveniens "neither originated in admiralty nor has its exclusive application there. To the contrary, it is and has

long been a doctrine of general application." 114 S.Ct. at 987. The Court reasoned further that the application of the state law could not be said to unduly interfere with the uniformity of maritime law, because preemption of the state law would not produce uniformity in any event. 114 S.Ct. at 987 and 989. The same considerations apply to the instant case.

B. The Rule of East River Is Not A Characteristic Feature of Admiralty Law.

Product liability claims are of relatively recent origin. It was not until the East River decision in 1986 that product liability was established as a part of maritime law. 476 U.S. at 863-866. Prior to East River, the trend among courts which recognized product liability claims in admiralty was to allow recovery when the only damage was to the product itself. Jig the Third Co. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (9176); Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468 (9th Cir. 1984); Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir.

1984). Thus, while the rule of East River is now established with respect to commercial vessels, it is certainly not a characteristic feature of maritime law. Moreover, the cases cited in Section II of this memorandum indicate clearly that the rule of East River is not even an established rule of maritime law with respect to consumer goods.

C. The Application of State Law Is a Characteristic Feature of Disputes Involving the Construction and Sale of Ships.

Moreover, a characteristic feature for more than a century has been that contracts for the construction and sale of ships lie outside admiralty jurisdiction and are governed by state law. People's Ferry Company v. Beers, 61 U.S. 393, 402 (1857). In Thames Towboat Company v. Schooner Frances McDonald, 254 U.S. 242 (1920), this Court held that such contracts:

> . . . are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately

> connected with navigation and commerce by water.

254 U.S. at 244. See also The ADA, 250 F. 194 (2d Cir. 1918). This Court acknowledged in East River that ship construction and sales contracts lie outside admiralty jurisdiction and are governed by state law. 476 U.S. at 872, n.7. Neither Congress nor this Court have ever sought to change that rule.

This Court has held in other cases that the non-maritime nature of ship construction contracts justifies the application of state law to casualties arising therefrom. In Grant Smith-Porter Ship Company v. Rohde, 257 U.S. 469 (1922), the Supreme Court held that a state workman's compensation statute could apply to a carpenter employed at a shipyard on the Willamette River who was injured while constructing a bulkhead on a vessel which had been launched but was still under construction. The worker's injury was within maritime jurisdiction at the time the case was decided. The Plymouth, 7 U.S. 20 (1866). The Court

held nevertheless that the injury was "maritime-but-local", and state law could apply, because shipbuilding is not maritime activity. Citing Thames Towboat, supra, the Court stated that:

> The contract for construction of [the vessel] was non-maritime, and although the uncompleted structure upon which the accident occurred was lying within navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce.

257 U.S. at 475-76. Rohde is still good law, having formed part of the basis for decisions by this Court that state and federal workmen's compensation statutes can apply concurrently to maritime but local injuries. Calbeck v. Travelers Insurance Company, 370 U.S. 114, 116 (1962); Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 717 (1980). Thus, claims arising from the construction and sale of ships have always been characterized by the application of diverse state laws. Moreover, the Supreme Court acknowledged in East River that "warranty and products liability are not static

bodies of law, and may overlap." 476 U.S. at 873, n.8. Since state law will continue to govern warranty claims, 476 U.S. at 872, n.7, the preemption of state law with respect to the product liability elements will not produce uniformity in any event and therefore will not serve any federal purpose that justifies the preemption of state law. The Washington Supreme Court completely ignored these considerations.

D. State Product Liability Law Should Be Applicable To All Product Liability Claims Involving Recreational Boats, Because Many Such Claims Fall Outside Admiralty Jurisdiction.

Maritime law is inapplicable to casualties occurring on non-navigable waters, because such casualties are not cognizable in admiralty. Sisson v. Ruby, 497 U.S. at 362; Foremost Ins. Co. v. Richardson, 457 U.S. at 670; Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Three Buoys Houseboat Vacations U.S.A. v. Morts, 921 F.2d 775 (8th Cir. 1990), cert. denied, 112 S. Ct. 272, 116 L. Ed. 2d 225 (1991) (admiralty jurisdiction did not apply to an accident between a service boat and a houseboat on the

Lake of the Ozarks in Missouri, because the lake was not navigable); Edwards v. Hurtel, 717 F.2d 1204 (8th Cir. 1983); (admiralty jurisdiction did not apply to an accident on a recreational lake which was not susceptible to use for commercial shipping); Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) (admiralty jurisdiction did not apply when a discharge of water caused a boat to capsize on a non-navigable river). For example, in Smith v. Hustler, Inc., 514 F.Supp. 1265 (W.D. La. 1981), admiralty jurisdiction was held inapplicable to an action against the manufacturer of a quick-disconnect device which failed on a motorboat in non-navigable waters. Although the claim in Smith was for bodily injuries, it could just as easily have been for the kind of economic loss involved in the instant case.

In American Dredging Company v. Miller, this Court recognized that preemption of state law on grounds of uniformity is not justified where uniformity is unlikely to result in any event. 114 S.Ct. at 986, 989. Recreational boats,

unlike commercial vessels, are used on non-navigable waters in large numbers. It benefits only the manufacturers, and serves no legitimate federal purpose, to hold that while manufacturers are subject to liability under state law for economic loss claims involving recreational boats on non-navigable waters, they are exempt from liability for similar claims arising on waters which are navigable.

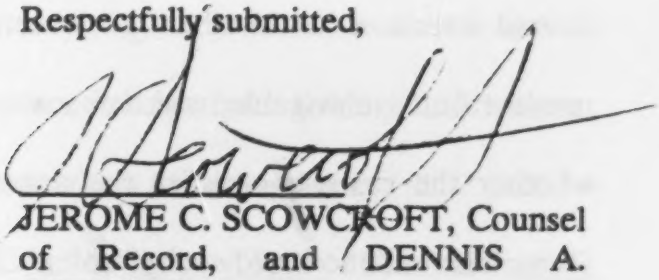
Similarly, the Court in Sisson v. Ruby did not purport to define all of the circumstances in which casualties involving recreational boats on navigable waters will be held to satisfy the nexus test for admiralty jurisdiction. It is quite possible at present that many product liability claims involving recreational boats on navigable waters will fall outside admiralty jurisdiction, particularly if the claim involves only economic loss rather than damage to other users of the waterways. Therefore, if the rule of East River is allowed to preempt state law as to recreational boats, there will be no certainty as to the circumstances in which

economic loss will be recoverable. There is a significant potential for transforming ordinary economic loss claims into constitutional tests of the limit of admiralty jurisdiction. The right to recover will be made to depend upon difficult factual issues as to whether the waterway on which the product fails is navigable, and if the waterway is navigable, whether the casualty satisfies the nexus test of Sisson v. Ruby. The need to avoid such problems formed the basis of a series of rulings by this Court that state and federal workmen's compensation statutes can apply concurrently to workmen injured in maritime employment. Parker v. Motorboat Sales, Inc., 314 U.S. 244, 249-250 (1942); Calbeck v. Traveler's Insurance Company, 370 U.S. 114, 120-122, 124 (1962); Sunship, Inc. v. Pennsylvania, 447 U.S. 715, 725-26 (1980). The same considerations mandate the application of state law to product liability claims involving recreational boats.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,



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Of SCHWABE, WILLIAMSON, FERGUSON & BURDELL
Attorneys for Petitioners

Supreme Court, U.S.
FILED

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No. 93-

In the Supreme Court
OF THE
United States

October Term, 1993

JAMES H. STANTON, WINNIFRED STANTON,
and their marital community,
and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

vs.

BAYLINER MARINE CORPORATION,

Respondents.

**On Writ of Certiorari to
the Supreme Court of the
State of Washington**

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Albany Insurance Company

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A 1-6	Decision of Superior Court dated October 9, 1990
A 7-23	Decision of Court of Appeals filed August 17, 1992
A 24-77	Decision of the Washington Supreme Court dated December 30, 1993
A 78-79	Order Denying Motion for Reconsidered dated March 10, 1994
A 80-82	Mandate of the Washington Supreme Court dated March 14, 1994.

FILED ON
OCT 9 1990

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES H. STANTON and WINNIFRED STANTON; et al.,

Plaintiffs,

v.

BAYLINER MARINE CORPORATION, a Delaware corporation, et al.,

Defendants.

ALBANY INSURANCE COMPANY, a foreign corporation,

Plaintiff,

v.

BAYLINER MARINE CORPORATION, a Delaware corporation, et al.,

Defendants.

NO. 88-2-21368-2

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

THIS MATTER having come on upon cross-motions for summary judgment by defendant Bayliner Marine Corporation and by plaintiffs. The Court was furnished with and considered the following supporting and opposing materials: From defendant Bayliner (1) Motion for Summary Judgment including authorities, (2) Declaration of Newell D. Smith with attachments, (3) Declaration of Ted Brewer, (4) Declaration of Dexter A. Washburn including attachments, and (5) Reply Brief; From plaintiffs (1) Cross Motion for Partial Summary Judgment and Memorandum, (2) Declaration of E. A. "Ted" Drake, (3) Declaration of Paul N. Daigle, and (4) Reply of Plaintiffs.

The claims of plaintiffs in these consolidated cases arise from separate casualties Involving two 45 foot Bayliner model 4550 motor yachts, the MOONRAKER and the CONTESSA.

The opposing motion papers identify two factual issues: (1) whether the subject events can be characterized as "sudden and calamitous" as those terms are defined and applied in Pennsylvania Glass & Sand Corp. v. Caterpillar Tractor Co., 652

F.2d 1165 (3d Cir. 1981) and (2) whether the configuration of the skeg keel is unreasonably dangerous under circumstances of ordinary use (see counter declarations of Drake and Brewer). However, neither of these issues is material to the order for partial summary judgment that follows and both are mooted by it. The remaining issues presented by these cross-motions for summary judgment are based upon facts that are undisputed and may be resolved as a matter of law.

The paramount question upon which all others will turn is whether or not the two casualties are within admiralty jurisdiction. The appropriate test is described in Foremost Ins. Co. v. Richardson, 457 U.S. 668, 73 L. Ed. 2d 300, 102 S.Ct. 2654 (1982). The test involves two considerations: (1) locality and (2) the events must have a significant relationship to traditional maritime activity. According to Sisson v. Ruby, 497 U.S. ___, 111 L. Ed. 2d 292, 110 Sup. Ct. 2892 (1990), the latter inquiry is applied in a "general sense" and not with reference to the specific facts of the case.

In the two casualties at bar both phases of the test are clearly met. In each case the locality was upon navigable waters and in each case errors in navigation resulted in accidents groundings. Such circumstances taken in a general sense, have an unmistakable and substantial relationship to traditional maritime activities of the kind described by the United States Supreme Court as dispositive. Moreover, the specific facts of both of these casualties likewise satisfy the test.

The import of admiralty jurisdiction for these state court actions is that this Court must apply admiralty law.

There is no cause of action under admiralty law for products liability claims for economic loss. East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 Sup. Ct. 2295, 90 L. Ed. 2d 865 (1986); WWP v. Graybar Electric Co., 112 Wn.2d 847, 862 (1989).

The plaintiffs' claims here are for the value of the two vessels, net of salvage; in other words, their "economic loss." In addition, the Stantons claim for loss of various items of personalty

having an alleged combined value of approximately $25,000.00. The Stantons argue that this loss will take all of their claims out of the rule enunciated in East River. The argument is rejected on two grounds: first, much of what has been enumerated by the Stantons appears to be normal furniture and furnishings of an operating pleasure boat and thus includable in the "economic loss" of the vessel itself; second, claims for personal property are distinguishable from the damages for loss of the vessel, Icelandic Coast Guard v. United Technologies, 722 F. Supp. 942 (D. Conn. 1989), which, although not controlling is persuasive on the point.

Based on the holding in East River the Court concludes that plaintiffs do not have a products liability or negligence claim for any economic loss attributable to the loss of the vessels or the vessels' furniture, equipment or furnishings. Accordingly, plaintiffs' complaints against both defendants based on product liability or negligence theories must be dismissed with prejudice.

To the extent the plaintiffs assert claims against the defendant Bayliner based on a breach of warranty theory, those

claims are likewise dismissed with prejudiced on the authority of Baughn v. Honda Motor Co., 107 Wn.2d 127, 727 P.2d 655 (1986).

Warranty claims against defendant Olympic Boat Center, Inc. are unaffected by this ruling.

To the extent the Stantons have claims for losses to personalty which was not equipment or furnishings of the MOONRAKER, those claims are preserved for the trial of this cause.

Finally, the court recognizes that a speedy review of this order and the judgment entered in conformity herewith may be essential to the efficient administration of justice and the protection of the interests of all of the parties In this case and accordingly, expressly finds there is no just reason for delay in the entry of a final partial summary judgment in conformity with this order together with the appropriate direction to the Clerk.

DONE IN OPEN COURT this 9th day of October, 1990.

/s/ RICHARDO S. MARTINEZ
JUDGE

FILED
AUG 17 1992

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES H. STANTON and WINNIFRED STANTON, and their marital community; and STANTON INVESTMENT COMPANY, INC., a Washington corporation,	NO. 27275-6-I
	DIVISION ONE
Appellants,	
v.	
BAYLINER MARINE CORPORATION, a Delaware corporation; and OLYMPIC SALES, INC., d/b/a OLYMPIC BOAT CENTERS, a Washington corporation,	
Respondents.	FILED: AUG 17 1992
ALBANY INSURANCE COMPANY, a Washington corporation,	
Appellant,	

v.

BAYLINER MARINE CORPORATION, a Delaware corporation; and OLYMPIC SALES, INC., d/b/a OLYMPIC BOAT CENTERS, a Washington corporation,

Respondents.

GROSSE, C.J. -- This is an appeal from an order granting partial summary judgment in favor of defendants, Bayliner Marine Corporation (Bayliner) and Olympic Sales, Inc., d/b/a Olympic Boat Centers (Olympic Boat). The claims of plaintiffs in these consolidated cases arise from separate casualties involving two 45-foot Bayliner model 4550 motor yachts, the MOONRAKER and CONTESSA. The MOONRAKER was owned by James H. Stanton, Winnifred Stanton, and Stanton Investment Company. The CONTESSA was owned by Wiley Dean Henry and Barbara Merlino Henry. Both yachts were insured by Albany Insurance Company (Albany).

The Stantons and the Henrys both bought Bayliner motor yachts from a sales office of the Olympic Boat Centers in Seattle, Washington. The vessels were manufactured by Bayliner, were constructed nearly identically, and were designed for recreational use. While the Stantons and the Henrys were pleasure boating, their yachts struck underwater objects: the Stantons' yacht struck a submerged rock in Puget Sound, Washington; the Henrys' yacht grounded on a reef off the coast of Vancouver Island, Canada. As a result of the collisions both boats suffered severe hull damage which caused mass flooding. Specifically, the keel of the vessels, a longitudinal extension of the hull that protrudes most deeply, penetrated on impact allowing seawater to sink the vessels rapidly.[1] The passengers on the Stanton yacht were rescued by nearby boaters; those aboard the Henry yacht were rescued by a Canadian maritime helicopter.

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[1]Bayliner asserts that the Stantons' boat sank in 27 minutes. The Stantons maintain it sunk in 12. The Henrys' boat did not sink as it remained lodged on the rocks upon which it had grounded.

The Stantons and Albany, under its subrogated interest, brought similar suits against Bayliner and Olympic Boat primarily seeking to recover the cost of replacing and repairing the yachts. They presented a declaration of a naval architect and marine engineer who stated that the design of the keel was defective and resulted in the losses for which Stanton and Albany were seeking recovery. The naval architect also stated that certain design techniques could have prevented the mass flooding.

Bayliner sought summary judgment dismissal of the bulk of Stanton's and Albany's claims on the ground that the suits predominantly sought recovery for economic losses (replacing and repairing the vessels) which are not recoverable under maritime law. The trial court granted the motion, dismissing substantially all of Stanton's and Albany's claims. This appeal followed.

Albany contends that the trial court erred in applying federal maritime law, which precludes recovery for economic losses, rather than state law, to claims arising from the grounding of two pleasure boats in navigable waters. Whether the trial court erred

turns on two questions: (1) whether admiralty jurisdiction is indeed proper here; and (2) if it is, whether admiralty law compels the choice of the federal over the state definition of "economic loss" on these facts. We consider each question in turn.

Jurisdiction

Bayliner contends, and Albany concedes, that admiralty jurisdiction applies. We agree. As a general rule, application of maritime jurisdiction is appropriate when the event giving rise to the suit occurs on navigable waters, and the potential hazard to maritime commerce arises from an activity that bears a substantial relationship to traditional maritime activity. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982). The second part of the test is determined by asking whether in a general sense such activity has the potential to affect maritime commerce, not whether it actually did so in the particular case at bar. Sisson v. Ruby, 497 U.S. 358, 111 L. Ed. 2d 292, 302, 110 S. Ct. 2892 (1990); Foremost Ins. Co. v. Richardson, supra.

The first part of the test is met, as the locality of the accidental groundings was upon navigable waters. The second part of the test is slightly more difficult to apply because the relevant case law provides no principled line of demarcation between circumstances that are deemed to carry the potential to disrupt maritime commerce, and thus lie within maritime jurisdiction, and those which do not.

The jurisdictional test is fact specific; not every accident that occurs on navigable waters and has the potential to disrupt maritime commerce will render the application of admiralty jurisdiction appropriate. In Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972), for example, the Supreme Court held that the sinking of an aircraft in navigable waters did not support a claim in admiralty, despite the fact that, strictly viewed, the sinking of the aircraft created a potential to disrupt surrounding navigable commerce. In that case, the Court considered that the facts were insufficiently

related to traditional maritime activity to support admiralty jurisdiction.

When the potential hazard to maritime commerce arises from an activity that bears a substantial relationship to traditional maritime activity, however, the application of admiralty jurisdiction is proper even though the suit involves noncommercial vessels. In Foremost, the Supreme Court considered whether an accident between two pleasure boats on navigable waters fell within the purview of admiralty jurisdiction. The Court reasoned that the potential impact on maritime commerce when two vessels collide, the need for uniform rules governing navigation, and the uncertainty likely to bet occasioned by at jurisdictional test tied to the commercial use of a given boat, rendered the application of admiralty jurisdiction appropriate. Similarly in Sisson v. Ruby, the Court held that admiralty jurisdiction existed over a case involving a noncommercial vessel. In that case, a fire erupted in the washer/dryer area of a pleasure yacht while it was docked at Lake Michigan marina, destroying the yacht, and damaging the marina

and neighboring vessels. The Court considered that the requirement of a potential hazard to maritime activity was met because the fire could have spread to nearby commercial vessels, or rendered the marina inaccessible to them. The Court also deemed that the storage and maintenance of vessels is sufficiently related to maritime activity to support admiralty jurisdiction.

The facts of this case bear a closer resemblance to those of Foremost and Sisson, in which the court held admiralty jurisdiction to be proper, than they do to Executive Jet. Insofar as the case involves the grounding of vessels in navigable waters, the requirements that the activity bear a sufficient relationship to maritime activity, and that the events at issue pose a potential hazard to such activity, are met. The case is therefore governed by maritime law. That jurisdictional determination does not by itself however dictate whether federal or state law should govern the definition of "economic loss". It is to that choice of law question which we now turn.

Choice of Law

Although Albany concedes that federal admiralty jurisdiction applies, it maintains that state law should displace federal law because the state has a significant interest in the issues at stake in this case, and because the application of state law would not unduly disturb the uniformity of federal maritime law.[2] It cites Kossick v. United Fruit Co., 365 U.S. 731, 738, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961) for this proposition. More specifically, Albany maintains that the Washington product liability act (WPLA) applies and that it would provide recovery for the economic losses sustained here. The disposition of this case turns on the definition of "economic loss" in a maritime context. Under federal maritime law, if a product injures only itself, the damages are categorized as "purely economic". Such losses cannot sound in tort; plaintiffs must resort instead to contract law:

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[2]Albany also maintains that it should recover under a Uniform Commercial Code warranty theory. The incomplete state of the record, however, does not permit us to pass on that assertion.

> Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain--traditionally the core concern of contract law.

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986).

The Washington Supreme Court considered and rejected this construction of "economic loss" in Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 864-66, 774 P.2d 1199, 779 P.2d 697 (1989). There, the court held that for the purpose of the prohibition of RCW 7.72.010(6) against recovering economic losses in a product liability action, whether economic losses are recoverable is determined by applying a "risk of harm" analysis rather than by assessing damages actually sustained. Graybar, 112

Wn.2d at 865.[3] The court's approach, although stopping short of identifying which of several versions of risk of harm analysis it prefers (see Graybar, 112 Wn.2d at 866-67), requires us to evaluate such factors as the nature of the product defect, the type of risk posed by that defect, and the manner in which the injury occurred. Graybar, 112 Wn.2d at 866-67. See also Touchet Valley Grain Growers, Inc. v. Opp & Seibold Constr., Inc., 119 Wn.2d 334, 352-55, 831 P.2d 724 (1992).

Traditionally, admiralty suits are governed by federal law. See generally, Southern Pac. Co. v. Jensen, 244 U.S. 205, 216, 61 L. Ed. 1086, 37 S. Ct. 524 (1917). The U.S. Supreme Court has recognized however that even where admiralty jurisdiction lies,

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[3]In Touchet Valley Grain Growers, Inc. v. Opp & Seibold Constr., Inc., 119 Wn.2d 334, 351, 831 Wn.2d 724 (1992), the court further refined this concept by explaining that although pure economic loss is recoverable only under the Uniform Commercial Code, the nature of the loss sustained is determined by a risk of harm analysis. The court however again declined to decide which approach to characterizing economic harm should apply. See Touchet, 119 Wn.2d at 352. As was true in that case, regardless of the definition of risk of harm applied, summary judgment is inappropriate on the facts alleged here, namely a product defect creating the risk of rapid sinking upon impact.

state law may nevertheless displace federal law when a matter of local concern is at stake and the application of state law would not unduly disturb the uniformity of the maritime legal system. See Kossick v. United Fruit Co., 365 U.S. at 738 (citing Western Fuel Co. v Garcia, 257 U.S. 233, 242, 66 L. Ed. 210, 42 S. Ct. 89 (1921) and Southern Pac. Co. v. Jensen, supra. See also Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990), cert. denied, 60 U.S.L.W. 3162 (U.S. June 8, 1992) (No. 91-349).

The U.S. Supreme Court has explicitly rejected the notion that "wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant." Kossick, 365 U.S. at 739. The Court explained:

> [T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction

> as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

Kossick, 365 U.S. at 739 (citing with approval the application of state wrongful death statutes, The Tungus v. Skovgaard, 358 U.S. 588, 3 L. Ed. 2d 524, 79 S. Ct. 503 (1959), The Hamilton, 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133 (1907), and state survival of actions statutes, Just v. Chambers, 312 U.S. 383, 312 U.S. 668, 85 L. Ed. 903, 61 S. Ct. 687 (1941) although the wrongs alleged were committed within admiralty jurisdiction and were defined by admiralty law).

In deciding whether to apply federal admiralty or state law to the definition of "economic loss" we engage in interest analysis, a process in which we weigh the respective state and federal interests implicated in the suit and apply the body of law in which

most of those interests reside. See Kossick, 365 U.S. at 738-42. When the state interests in a matter outweigh federal maritime interests, a court is said to apply "maritime and local" laws. See Kossick, 365 U.S. at 738.

Interest analysis leads us to conclude that Washington's definition of "economic loss" should apply. Whatever federal interest in uniformity exists, it is outweighed by Washington's concern to ensure the personal safety of its citizens, to deter the manufacture and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction. The WPLA, whose very application is at issue in this case, itself attests to those interests. See generally, RCW 7.72. The Washington Supreme Court gave expression to those concerns when it rejected the East River approach to defining "economic loss":

> The Court's Analysis in East River, we believe, unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects. For this

reason, we find East River's approach to economic loss unsuited to what the Legislature intended under the WPLA. . . .

In contrast to the East River approach, risk of harm analysis appropriately accommodates the safety and risk-spreading policies that underlie the law of product liability, and "provides a workable and accurate distinction between accidents that should be actionable in tort and losses that should remain in the domain of warranty law." Comment, Asbestos in Schools and the Economic Loss Doctrine, 54 U. Chi. L. Rev. 277, 300 (1987). Under this analysis, the fact that a hazardous product defect has injured only the product itself, and not persons or other property, is properly regarded as a "pure fortuity". Consumers Power Co. v Curtiss-Wright Corp., 780 F. 2d 1093, 1099 (3d cir. 1986). Thus, the, same remedy is made available for this sort of injury as would be available if the product defect had injured something or someone else.

Graybar, 112 Wn.2d at 864-66.

In view of Graybar's explicit and unequivocal rejection of the East River approach, and the amply articulated rationale underlying that rejection, see Graybar, 112 Wn.2d at 863-66, we are constrained to conclude that Washington has a significant interest in a divergent interpretation of "economic loss". Because a significant state interest is at stake, and because its application would not unduly disrupt the uniformity of federal admiralty law, federal admiralty law permits us to apply state law. We therefore apply the Graybar definition of "economic loss" to Stanton's and Albany's claims. Because Stanton and Albany produced evidence to support the contention that their economic losses resulted from a product defect that posed a risk of harm, the trial court erred in dismissing their claims, which may properly be heard under the WPLA.

Not argued by the parties but equally dispositive is the following reasoning: Under admiralty law, "economic loss" claims must sound in contract or not at all. See East River, 476 U.S. at

870. The substantive contract law which applies to the claims asserted here is Washington's. Washington's product liability act (RCW 7.72) creates a single cause of action for product-related harms that preempts previously existing common law product liability remedies See RCW 7.72.010(4) and Graybar, 112 Wn.2d at 853-54. Under the product liability statute, "economic loss" is determined by a risk of harm analysis. See Graybar, 112 Wn.2d at 860, citing Stuart v. Coldwell Banker Comm'l Group, Inc., 109 Wn.2d 406, 417-22, 745 P.2d 1284 (1987). Thus, even applying admiralty law to the claims herein would require reversal.

The judgment of the trial court is reversed and the case remanded.

ALEXANDER, C.J. and PETRICH, J. concur with MORGAN, J.

DATED
DEC 30 1993

THE SUPREME COURT OF WASHINGTON

JAMES H. STANTON, ET AL., Respondents,	)	
v.	)	No. 60031-7
BAYLINER MARINE CORPORATION, Petitioner.	)	EN BANC
ALBANY INSURANCE COMPANY, Respondent,	)	
v.	)	
BAYLINER MARINE CORPORATION, Petitioner.	)	

Guy, J. - In consolidated actions against Bayliner Marine Corporation and Olympic Sales, Inc. (hereafter collectively Bayliner), plaintiffs seek recovery of the cost of replacing or repairing damaged yachts. Bayliner seeks review of a Court of Appeals decision reversing the trial court's order of partial summary judgment in its favor. We reverse the Court of Appeals.

BACKGROUND

In December 1985, plaintiffs James Stanton, Winnifred Stanton, and Stanton Investment Company purchased the *Moonraker,* a 45-foot model 4550 Bayliner motor yacht, from Olympic Sales, Inc., doing business as Olympic Boat Centers, in Seattle, Washington, for $225,342. In April 1988, plaintiff Wiley Dean Henry purchased the *M/V Contessa,* also a Bayliner model 4550 motor yacht, from Olympic Sales, Inc., for $251,548.70. Albany Insurance Company insured both yachts.

On separate occasions, while the Stantons and Henry were pleasure boating, their yachts struck underwater objects. The *Moonraker* struck a submerged rock in Puget Sound in 1987, while

the *Contessa* struck a reef off of Vancouver Island, Canada, in 1988. Both yachts sustained severe hull damage which caused mass flooding. The Stantons' boat rapidly sank, but the Stantons were rescued by nearby boaters. Henry's boat remained lodged on the rocks; Henry and his passengers were rescued by a Canadian maritime helicopter. No one suffered personal injury in either incident. Each boat was determined to be a constructive total loss. Salvage values for each boat ranged between $42,000 and $46,000.

The Stantons and Albany, under its subrogated interest from Henry, brought suits against Bayliner and Olympic Sales for products liability, negligence, breach of warranty, and violation of the Consumer Protection Act. The plaintiffs primarily seek to recover their "economic losses", or the cost of replacing and repairing the yachts. In addition, the Stantons claim loss of various items of personal property having an alleged combined value of approximately $25,000. The plaintiffs submitted the declaration of Mr. Ted Drake, a naval architect/marine engineer, who stated that the keel design of the Bayliner model 4550 was

defective and created an unreasonable risk of mass flooding should penetration occur due to accidental grounding or stranding. Mr. Drake also stated that certain design techniques could have prevented the mass flooding.

Citing *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986), Bayliner moved for summary judgment, claiming that admiralty law applies and precludes recovery for economic losses under either tort theory of products liability or negligence. Bayliner also argued that plaintiffs' warranty claim, governed by state law, did not allow recovery against Bayliner under a breach of warranty theory since the plaintiffs and Bayliner did not have privity of contract. Plaintiffs cross-moved for partial summary judgment, claiming that the Washington products liability act governed the facts of this case thereby permitting the recovery sought. The trial court granted Bayliner's motion, dismissing substantially all of plaintiffs'

claims,[1] and entered an order of finality. The plaintiffs appealed, claiming that the Washington products liability act (WPLA) applies and provides a remedy for the economic losses sustained in this case. *See Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) (economic loss within context of WPLA determined by "risk of harm" analysis).

The Court of Appeals reversed and remanded, holding that while admiralty jurisdiction applied, substantive admiralty law permits the application of state tort law to determine whether economic loss is compensable. *Stanton v. Bayliner Marine Corp.*, 68 Wn. App. 125, 130-33, 844 P.2d 1019 (1992). In view of Graybar's explicit and unequivocal rejection of *East River's* approach to "economic loss", the Court of Appeals concluded that Washington has a significant interest in a divergent interpretation

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[1]The trial court left intact plaintiffs' warranty claims against defendant Olympic Sales, and the Stantons' claim for losses to personalty which was not equipment or furnishings of the *Moonraker*.

of economic loss, and that the plaintiffs' claims may properly be heard under the WPLA. *Bayliner,* 68 Wn. App. at 133.

We granted Bayliner's petition for review. We reverse the Court of Appeals.

ISSUE

The sole issue before us is whether the plaintiffs may recover damages for economic loss under Washington law in a tort claim arising under admiralty jurisdiction but filed in state court. Because the plaintiffs' claims arise under admiralty jurisdiction, we hold that substantive admiralty law precludes application of a state law remedy for the economic loss of the yachts; plaintiffs' claim for damages may properly be pursued in warranty against the seller under the Uniform Commercial Code (RCW 62A).

ANALYSIS

I

Background

These consolidated cases were brought by the plaintiffs to recover for the loss of two Bayliner boats and personal property

on board at the time of the boats' grounding. The plaintiffs primarily seek to recover damages for "economic loss" - the cost of replacing and repairing the yachts. To better understand the economic loss rule in the context of this case, we first must discuss relevant portions of the WPLA, the Supreme Court's decision in *East River,* and this court's decision in *Graybar.*

Under the WPLA,[2] a purchaser of a defective product may assert a product liability claim against a "product seller", which includes a manufacturer, wholesaler, distributor, or retailer of the product. RCW 7.72-010(1). A "product liability claim" includes, in relevant part, any claim or action brought for harm caused by the manufacture, construction, fabrication, production, design or marketing of the relevant product. RCW 7.72.010(4). The WPLA broadly defines "harm" as "any damages recognized by the courts of this state: PROVIDED, That the term 'harm' does not include direct or consequential economic loss under Title 62A RCW [UCC]." RCW 7.72.010(6). The WPLA therefore provides no

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[2]RCW 7.72.010-.060.

recovery for direct or consequential economic loss. *See Washington Water Power Co. v. Graybar Elec. Co., supra. See also Comment, Determining Recoverable Economic Harm Under the Washington Product Liability Act,* 27 Gonz. L. Rev. 335, 337 (1991-1992). The WPLA does not prevent the recovery of direct or consequential economic loss under RCW Title 62A (UCC). RCW 7.72.020(2).

In *East River S.S. Corp.,* the Supreme Court held that no products liability claim lies in admiralty when the only injury claimed is economic loss. *East River,* 476 U.S. at 871, 876. In *East River,* a group of ship charterers sued a shipbuilder who had contracted to design, manufacture, and install turbines which would be the main propulsion unit for four 225,000-ton, $125 million, supertankers. *East River,* 476 U.S. at 859. When the ships were put into service, the turbines on all four malfunctioned because of design and manufacturing defects. However, only the products themselves were damaged. The charterer sued in federal court, alleging tortious conduct based on the products liability doc-

trine, and asked for damages for the cost of repairing the ships and for income lost while they were out of service. *East River,* 476 U.S. at 861. The harm was pure economic loss, without physical injury to either a person or other property.

In *East River,* the Supreme Court incorporated products liability, including strict liability, into the general maritime law. *East River,* 476 U.S. at 865. The Court also resolved the issue of whether a plaintiff in a maritime products liability action could recover damages for economic loss. Exercising its discretion in admiralty, a unanimous Court held that a "manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *East River,* 476 U.S. at 871. Therefore, when a product damages only itself, and not persons or other property, the proper remedy lies in contract, not in tort, no matter how the product injury occurred. *East River,* 476 U.S. at 871-72.

In *Washington Water Power Co. v. Graybar Elec. Co., supra,* a nonadmiralty case, this court found *East River's* approach to

"economic loss" unsuited to what the Legislature intended under the WPLA. *Graybar,* 112 Wn.2d at 864. In Graybar, Washington Water Power (WWP) sued the manufacturer and distributor of electric deadend insulators in federal district court to recover damages incident to the failure of thousands of insulators. WWP's complaint alleged, among other things, violation of the WPLA, as well as negligence and strict liability under the common law. *Graybar,* 112 Wn.2d at 849. While WWP claimed that the defective insulators had caused some bodily injury and property damage, the bulk of WWP's claim involved the cost of replacing the insulators. *Graybar,* 112 Wn.2d at 849.

The defendants moved for partial summary judgment on WWP's tort claims, arguing that the costs of WWP's insulator replacement program constituted economic loss recoverable only under the UCC since the WPLA excludes economic loss from its remedial scheme and preempts common law tort remedies. *Graybar,* 112 Wn.2d at 850. The Federal District Court certified to this court the issues of the nature of WWP's loss, whether the

WPLA applied, and if so, whether economic loss was recoverable under the act. *Graybar,* 112 Wn.2d at 847-48. The *Graybar* court responded that the WPLA creates a single cause of action for product-related harms that preempts common law remedies and that the WPLA does not afford a remedy for economic loss. *Graybar,* 112 Wn.2d at 860. The court, however, declined to follow *East River's* economic loss rule. *Graybar,* 112 Wn.2d at 864-66. The court held instead that whether economic losses are recoverable within the context of the WPLA is determined by applying a "risk of harm" analysis, rather than by assessing damages actually sustained. *Graybar, 112* Wn.2d at 865-67. By adopting the "risk of harm approach, Washington joined those intermediate jurisdictions that apply "risk of harm" analysis to determine whether a defect "is so hazardous that a plaintiff 's tort claim is justified even when the product has yet to injure persons or property." *See* Comment, 27 Gonz. L. Rev. at 339.

The court reasoned that "risk of harm" analysis is used to determine whether the safety-insurance policy of tort law or the

expectation-bargain protection policy of warranty law is most applicable to the claim in question. *Graybar, 112* Wn.2d at 860-61. The court stated:

> In contrast to the *East River* approach, risk of harm analysis appropriately accommodates the safety and risk-spreading policies that underlie the law of product liability, and "provides a workable and accurate distinction between accidents that should be actionable in tort and losses that should remain in the domain of warranty law."

Graybar, 112 Wn.2d at 865 (quoting Comment, *Asbestos in Schools and the Economic Loss Doctrine,* 54 U. Chi. L. Rev. 277, 300 (1987)). The court noted that under this approach,[3] "the fact

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[3]The court in Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) left for another day the determination of how the risk of harm analysis would be applied. The court did discuss two approaches: the "sudden and dangerous test" approach, and the "evaluative" approach. Under the "sudden and dangerous" approach to risk of harm analysis, economic loss is distinguished from other damages according to the manner in which the product failure has occurred. If the failure is the result of a sudden and dangerous event, it is remediable under tort principles. If no such event has occurred, the product failure is deemed economic loss. The evaluative approach, on the other hand, proceeds on the theory that a product user should not have to suffer a calamitous event before earning

that a hazardous product defect has injured only the product itself, and not persons or other property, is properly regarded as a 'pure fortuity". *Graybar,* 112 Wn.2d at 865-66. In *Touchet Vly. Grain Growers, Inc. v. Opp & Seibold Gen. Constr, Inc.*, 119 Wn.2d 334, 351, 831 P.2d 724 (1992), we reaffirmed Graybar's holding that use of risk of harm analysis is appropriate for determining the nature of damages.

Court of Appeals Decision

Concluding that the case was governed by admiralty jurisdiction, the Court of Appeals turned to the choice of law question to determine which definition of "economic loss" to apply.

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his remedy. The *Graybar* court declined to decide which of these approaches is appropriate under the scheme of the WPLA. *Graybar,* 112 Wn.2d at 866-67. One commentator suggested a third approach - based on consumer expectations. See Comment, *Determining Recoverable Economic Harm Under the Washington Product Liability Act,* 27 Gonz. L. Rev. 335, 342-44 (1991-1992) (one would not expect the resulting damage to be caused by the product's failure to perform its intended function.) The commercial expectation test asks "whether the damage caused by the product's defect goes beyond the failure of the product to do what it was supposed to do and actually poses a threat of harm. If the court finds that such a threat of harm exists, above and beyond the failure of the product to perform its intended function, then the appropriate remedy is in tort since the plaintiff is at risk due to the defendant's unsafe manufacturing practices." 27 Gonz. L. Rev. at 344.

Stanton v. Bayliner Marine Corp., 68 Wn. App. 125, 129-30, 844 P.2d 1019 (1992). The court stated that "even where admiralty jurisdiction lies, state law may nevertheless displace federal law when a matter of local concern is at stake and the application of state law would not unduly disturb the uniformity of the maritime legal system." *Bayliner,* 68 Wn. App. at 131 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 738, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961)). The court stated that this "maritime and local" determination is made by balancing state and federal interests. *Bayliner,* 68 Wn. App. at 132.

Utilizing "interest analysis", the Court of Appeals held that Washington's definition of "economic loss" should apply to this case. *Bayliner,* 68 Wn. App. at 132. The Court of Appeals reasoned that whatever federal interest in maritime uniformity exists, it is outweighed by "Washington's concern to ensure the personal safety of its citizens, to deter the manufacture and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction." *Bayliner*, 68 Wn.

App. at 132 (citing generally RCW 7.72 and *Graybar,* 112 Wn.2d at 864-66). The court concluded that because a significant state interest is at stake, and because the application of Washington law would not unduly disrupt the uniformity of federal admiralty law, "federal admiralty law permits us to apply state law." *Bayliner,* 68 Wn. App. at 133.

Bayliner contends that the Court of Appeals erred in its determination that state law, and not federal admiralty law, governs the resolution of this case. Bayliner claims the rule in *Washington Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) conflicts with federal admiralty law *(East River)* instead of merely "supplementing" it. Bayliner argues that the admiralty rule in *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986) therefore precludes the plaintiffs from pursuing their claim under state law.

Stanton and Albany (hereafter collectively Stanton), on the other hand, contend that the rule in *East River* does not apply to

the consumer transactions involved in these cases. Stanton argues that even if *East River* does apply to the facts of this case, Washington law is not preempted by federal admiralty law since it does not interfere with the uniform application of admiralty law.

ANALYSIS

Review of the Court of Appeals decision requires inquiry into two questions: First, does admiralty jurisdiction apply? Second, if admiralty jurisdiction applies, does substantive admiralty law preempt application of Washington's rule on economic loss"? Although the Court of Appeals properly concluded that Washington has a significant interest in a divergent interpretation of economic loss, the court erred in holding that Washington law, as expressed in *Graybar,* displaces the admiralty rule in *East River.*

Admiralty Jurisdiction Applies

[1] Bayliner contends, and Stanton concedes, that admiralty jurisdiction applies. As the Court of Appeals stated, application of admiralty jurisdiction is appropriate when the event giving rise

to the suit occurs on navigable waters, and the potential hazard to maritime commerce arises from an activity that bears a substantial relationship to traditional maritime activity." *Bayliner,* 68 Wn. App. at 128 (citing *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982)).

The first part of the test is met since the accidental groundings occurred in navigable waters. The second part of the test requires a determination of whether the activity has the potential to affect maritime commerce, not whether it actually affected commerce in the specific case. *Sisson v. Ruby,* 497 U.S. 358, 366-67, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1990). The second part of the test is met since the accidental groundings in this case had the potential to affect maritime commerce. *Sisson,* at 366-67 (the operation of a pleasure vessel in navigable waters bears a relation to maritime commerce, and thus, is within admiralty jurisdiction). Admiralty jurisdiction applies, therefore, despite the fact that this suit involves noncommercial vessels. *Foremost,* 457 U.S. at 675-77 (admiralty tort jurisdiction extends

to noncommercial activity such as actions arising out of the use of pleasure craft on navigable waters). *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993) (a fatal accident involving a Jet Ski and a 20-foot power boat on the Thames River in Connecticut); *Ruehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987). *See also* Wonacott, *Products Liabilities of Shipbuilders and Repairers*, 62 Tul. L. Rev. 465, 476 (1987-1988).

Inasmuch as admiralty jurisdiction applies, we next determine whether substantive admiralty law precludes the application of a state law remedy. The question is whether the Court of Appeals properly determined that Washington law *supplements*, rather than conflicts with, admiralty law, allowing plaintiffs to pursue their products liability claim under Washington law. In order to reach this issue we must first decide whether the admiralty rule in *East River* applies to the consumer transaction involved in this case.

The issue resolved in *East River* was "whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any

contractual obligation." *East River,* 476 U.S. at 866. The Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *East River,* 476 U.S. at 871. The Court specifically reserved the issue "whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic." *East River,* 476 U.S. at 871 n.6.

The parties vigorously dispute whether *East River* is limited to its commercial facts and language. Stanton contends that the language in *East River* indicates that its rule is not well established as to consumer transactions involving pleasure boats and, thus, does not preclude application of state law in this case. Bayliner, on the other hand, contends that *East River* is not limited to its commercial facts.

In support of their position, respondents cite *Sherman v. Johnson & Towers Baltimore, Inc.,* 760 F. Supp. 499 (D. Md. 1990). The Sherman court concluded that because the plaintiffs and the defendant were not in a commercial relationship, the rule

in *East River* did not preclude plaintiffs' claim as a matter of law. *Sherman,* 760 F. Supp. at 502. In Sherman, buyers of a pleasure yacht destroyed by fire brought suit against the manufacturer in contract and tort. The defendant moved to dismiss the plaintiffs' tort claims under the authority of *East River. Sherman,* 760 F. Supp. at 501. The Sherman court cited *East River's* language reserving judgment on the issue of whether a tort cause of action "can ever be stated in admiralty", *East River,* at 871 n.6, and stated:

> "Therefore, a maritime tort claim alleging purely economic loss should not be dismissed for want of subject matter jurisdiction where the requirements for admiralty jurisdiction are otherwise met if the facts of the case support a theory of recovery *not clearly barred by East River* or by other controlling authority."

(Some italics ours.) Sherman, 760 F. Supp. at 501 (quoting *Employers Ins. v. Suwannee River Spa Lines, Inc.,* 866 F.2d 752, 760 (5th Cir. 1989)). The court held that the plaintiffs' theory of recovery was not barred by *East River* because *East River* limited

its holding to commercial situations and this case involved a consumer (noncommercial) transaction. Sherman, 760 F. Supp. at 502. The court noted that other courts and commentators have drawn this same distinction. *Sherman*, 760 F. Supp. at 502 (citing *Employers Ins.*, 866 F.2d at 764 (maritime case referencing *East River as* authority for resolving commercial disputes under contract law); *Richard O'Brien Cos. v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466, 472 (D. Colo. 1987); *Consumers Power Co. v. Mississippi Vly. Structural Steel Co.*, 636 F. Supp. 1100, 1112 (E.D. Mich. 1986); Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under Robins Dry Dock*, 18 J. Mar. L. & Com. 157, 177 n.106 (1987) (*East River* left to speculation the question of whether its rule applies in consumer cases); Force, *Maritime Products Liability in the United States, 11* Mar. Law. 1, 7, 34 (1986)).

Bayliner disputes Stanton's reliance on Sherman, claiming that the majority of maritime cases since *East River* have not made a distinction between commercial and noncommercial vessels. We

agree. For example, *Karshan v. Mattituck Inlet Marina & Shipyard Inc.*, 785 F. Supp. 363 (E.D.N.Y 1992) declined to follow Sherman. The court held that a cause of action in tort could not be stated when the only damages alleged were to the vessel itself, regardless of whether the owner was a consumer or a commercial buyer. *Karshan*, 785 F Supp. at 366. In that case, the owner of a yacht and insurers sued the boat seller under strict products liability theory for property losses as a result of a fire on the yacht. Much like Bayliner, the defendant argued that *East River* applied to the facts of the case and entitled defendant to summary judgment. *Karshan*, 785 F Supp. at 364. The plaintiffs, like Stanton, attempted to distinguish *East River* on the grounds that they had alleged damage other than to the product itself, and that the boat was not purchased in a commercial transaction. Karshan, 785 F. Supp. at 364. The court disagreed. It found plaintiffs' claim of other property damage unsupportable and stated that the Supreme Court in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986) did

not confine its rationale to commercial transactions.[4] *Karshan*, 785 F. Supp. at 365-66.

Karshan applied the *East River* maritime economic loss rule to a noncommercial pleasure boat, citing the Supreme Court's broad concern that tort actions and warranty actions be kept separate. The court also noted as a matter of public policy that a vessel owner can best protect himself from economic loss through insurance. *See Karshan*, 785 F. Supp. at 366. As one commentator (cited in *Karshan)* noted, the *East River* Court's expansive reasoning appears to have been directed at cutting off any movement to impose liability for economic losses, even in the consumer context. See Swanson, *The Citadel Survives a Naval*

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[4]As the court noted in a footnote: "[Many of the sources cited in *East River (S.S. Corp. v. Transamerica Delaval* Inc., 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986)] are relevant to consumer transactions. These include: Restatement (Second) of Torts §§ 395 and 402A (1965) (cited by *East River, 476* U.S. at 868 n. 3, 106 S.Ct. at 2300 n. 3); U.C.C. §§ 2-313, 2-314 and 2-315 (cited at 476 U.S. p. 872, 106 S.Ct. p. 2303); and *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 66-67, 207 A.2d 305, 312-13 [16 A.L.R.3d 6701 (1965) (cited at 476 U.S. p. 868 and p. 870, 106 S.Ct. p. 2301 and p. 2302)." *Karshan v. Mattituck Inlet Marina & Shipyard Inc.*, 785 F. Supp. 363, 366 n.4 (E.D.N.Y 1992).

Bombardment: A Policy Analysis of the Economic Loss Doctrine, 12 Tul. Mar. L.J. 135, 181 (1987).

In *Simone v. Genmar Indus., Inc.,* 1989 Am. Mar. Cas. 2627 (S.D.N.Y), the plaintiff sued a yacht manufacturer alleging negligence based on a manufacturing defect. The boat had developed "gelcoat blisters" on its hull. Although the court determined that admiralty jurisdiction did not apply, it noted that under either New York or maritime jurisdiction, the result would have been the same: no recovery in tort for product liability damages to the product itself. *Simone*, 4 Am. Mar. Cas. at 2629 (citing *East River,* 476 U.S. at 871).

In *Sisson v. Hatteras Yachts,* Inc., 778 F. Supp. 959 (N.D. Ill. 1991), plaintiffs sought damages for economic loss, alleging that their yacht was damaged by a defective washer/ dryer unit. The court granted the defendants' motion for summary judgment based on the rule in *East River,* holding that the plaintiffs were precluded from recovery in tort.

In *Lewinter v. Genmar Indus., Inc.*, 1993 Am. Mar. Cas. 939 (Cal. Super. Ct.), plaintiffs sued the yacht manufacturer alleging negligence and strict liability for defective lamination of yacht sections which resulted in catastrophic hull failure. The defendant moved for summary judgment, claiming that the rule in *East River* precluded recovery for economic losses arising out of damage to the product itself. The plaintiffs, like Stanton, argued that *East River* was not applicable because there was no commercial relationship between plaintiffs and defendant manufacturer. The court, citing *Sisson v. Hatteras, supra,* and *Karshan v. Mattituck Inlet Marina & Shipyard Inc., supra,* refused to limit *East River* to commercial transactions. *Lewinter,* 1993 Am. Mar. Cas. at 944-47. The court noted the Sherman decision but found the reasoning of *Sisson* and *Karshan* more persuasive:

> The Sherman Court correctly noted that many of the passages in *East River* refer to "commercial" transactions and relationships, and that the *East River* Court limited its holding to commercial situations. However, *Sisson* and

> *Karshan* correctly observe that most, if not all, of *East River's* reasoning is equally applicable to so called "consumer" transactions.

Lewinter, 1993 Am. Mar. Cas. at 946-47. *See also Swanson,* 12 Tul. Mar. L.J. at 181 *(East River's* reasoning applicable in consumer context). The *Lewinter* court emphasized that any attempt to limit *East River* to commercial, as opposed to consumer, transactions could create confusion, unfairness, and unpredictability: "A manufacturer's expectation of, and entitlement to, the protection of *East River* should not, and cannot, turn on the purpose a downstream purchaser, with which the manufacturer had no dealings, had in purchasing the vessel." *Lewinter,* 1993 Am. Mar. Cas. at 948. In addition to these maritime cases applying *East River* to consumer transactions, Bayliner cites several land-based cases which have applied *East River* to noncommercial facts.[5] For example, in *Dairyland Ins. Co. v. General Motors*

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[5]Although *Washington Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) was also a land-based case, it declined to apply *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986) because of

Corp., 549 So. 2d 44 (Ala. 1989), the Alabama Supreme Court applied *East River* to deny recovery in tort to a consumer buyer of a General Motors van which caught fire while being driven and was destroyed. In *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990), the court applied the holding in *East River* to deny tort recovery where consumer mobile home purchasers brought an action against the manufacturer for defective roofs. In *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992), a buyer brought a products liability action against the seller of a home building kit. The court similarly refused to create an exception to the *East River* rule for a noncommercial consumer. Danforth, at 1200.

[2] On balance, the weight of authority interprets East River's maritime products liability rule as applicable to both commercial and consumer transactions. As the Supreme Court noted in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675-76, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982), the federal interest in

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its definition of "economic loss", not because of any dispute over its application to consumer transactions.

protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. Bayliner further argues that a strict commercial/ noncommercial distinction makes no sense given the facts of this case: one of the plaintiffs, Stanton Investment Co., is a corporation and is therefore a commercial entity and that, in addition, the plaintiffs' claims have been brought by a subrogated insurance carrier which, arguably, is not a consumer.[6]

[3] Because plaintiffs suffered damage to property other than the boats, they claim that by reason thereof they are entitled to recover not only the value of the personal property, but also the value of the boats. We disagree. This argument was advanced

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[6]In response, Stanton cites *Farmers Home Mut. Ins. Co. v. Insurance Co. of North* Am., 20 Wn. App. 815, 583 P.2d 644 (1978), *review denied*, 91 Wn.2d 1014, *cert. denied*, 442 U.S. 942 (1979) as authority that a federal admiralty rule applicable to insurance clauses covering commercial ships did not apply to recreational boats. The court noted that the interpretation of marine insurance policies was left to the states because there was no well-established federal rule on point. *Farmers*, at 819. In this case, application of *East River's* maritime economic loss rule to consumer recreational boats is well established.

and rejected in *Lewinter v. Genmar Indus., Inc.*, 1993 Am. Mar. Cas. at 948-49. *See also Nicor Supply Ships Assocs. v. General Motors Corp.*, 876 F.2d 501 (5th Cir. 1989). In this case, the trial court properly preserved for trial Stantons' claims for losses to personalty which was not equipment or furniture of the *Moonraker. See Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499, 502-03 (D. Md. 1990) (plaintiffs may assert a claim in tort for economic damage which goes beyond the product itself).

In summary, the weight of authority persuades us that the rule in *East River* does apply to consumer transactions involving pleasure boats. We must next determine whether *East River's* maritime economic loss rule applies to the exclusion of state law.

Substantive Admiralty Law Preempts Application of a State Law Remedy

Applying "interest analysis", the Court of Appeals concluded that Washington's definition of "economic loss" should apply. *Stanton v. Bayliner Marine Corp.*, 68 Wn. App. 125, 132, 844 P.2d

1019 (1992) (citing *Kossick v. United Fruit Co.*, 365 U.S 731, 738-42, 6 L. Ed. 2d 56, 81 S.Ct. 886 (1961)). Citing *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986), Bayliner argues that "[with admiralty jurisdiction comes the application of substantive admiralty law." Bayliner contends that the application of substantive admiralty law in this case means that no products liability claim lies in admiralty when the only injury claimed is economic loss. Stanton, on the other hand, argues that state law is not preempted if it does not interfere with the uniform system of federal maritime law. Stanton claims that Washington law "supplements" the remedies available in admiralty.

Article 3, section 2 of the United States Constitution provides in part that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction". This provision, by implication, grants Congress the power to revise and supplement the maritime law, and grants federal courts power to develop the general maritime law. *Pacific Merchant Shipping Assn*

v. Aubry, 918 F.2d 1409, 1421 (9th Cir. 1990) (citing *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 360-61, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)), *cert. denied,* 119 L. Ed. 2d 578 (1992). State courts, however, have concurrent jurisdiction over maritime claims. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222, 91 L. Ed. 2d 174, 106 S. Ct. 2485 (1986).

The process of determining the applicability of state law in cases within the admiralty jurisdiction has been described as one of accommodation, "entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." *Kossick,* 365 U.S. at 739 (citing with approval the application of state wrongful death statutes, *The Tungus v. Skovgaard,* 358 U.S. 588, 3 L. Ed. 2d 524, 79 S. Ct. 503 (1959); *The Hamilton,* 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133 (1907); and state survival of actions statutes, *Just v. Chambers, 312* U.S. 383, 85 L. Ed. 903, 61 S. Ct. 687 (1941)).

[4] Relying on *Kossick*, the Court of Appeals stated that even though a cause of action arises under admiralty jurisdiction, state law may "displace" federal law when a matter of local concern is at stake and the application of state law would not disturb the uniformity of maritime law. *Bayliner*, 68 Wn. App. at 131-32. Although *Kossick* endorsed the notion of balancing local concerns against federal interests in some circumstances, it does not stand for the proposition that state law may displace *conflicting* federal law. *See Kossick*, 365 U.S. at 742.

The federal statute conferring admiralty jurisdiction on federal district courts "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(l). The Supreme Court has said that this statute

> leaves state courts competent to adjudicate maritime causes of action in proceedings in *personam* and means that "a state, 'having concurrent ' jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit,' so long as it does not attempt to [give in rem remedies or]

> make changes in the 'substantive maritime law.'" Stated another way, the "saving to suitors" clause allows state courts to entertain in personam maritime causes of action, but in such cases the *extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.*

(Citation omitted. Some italics ours.) *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. at 222-23 (quoting *Madruga v. Superior Court,* 346 U.S. 556, 560-61, 98 L. Ed. 290, 74 S. Ct. 298 (1954)).

In *Bohemia, Inc. v. Home Ins. Co.,* 725 F.2d 506, 510 (9th Cir. 1984), the court, interpreting both *Kossick v. United Fruit Co., supra,* and *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368 (1955), stated that state law will control "in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Accord, Port Lynch, Inc. v. New England Int'l Assurety of Am.,*

Inc., 754 F. Supp. 816, 820 (WD. Wash. 1991); *Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409 (9th Cir. 1990). The *Aubry* court similarly concluded that the general rule on preemption in admiralty is that "states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." Aubry, 918 F.2d at 1422.

Applying this standard, we next determine whether application of the rule on economic loss in *Washington Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) conflicts with federal law, or whether it would disrupt the uniform application of maritime law.

Federal Preemption, *Graybar,* and
the Economic Loss Rule

It is undisputed that the design or manufacture of a defective product may qualify as a maritime tort. In *East River,* the Supreme Court incorporated products liability, including strict liability, into the general maritime law and held that no products liability claim lies in admiralty when the only injury claimed is

economic loss. *East River,* 476 U.S. at 865, 876. *East River* stands as a "judicially fashioned admiralty rule" applicable to the facts of this case.

[5] The WPLA does not conflict with the holding in *East River.* Both the WPLA and *East River* exclude damage claims for "economic loss". RCW 7.72.010(6); *Graybar, 112* Wn.2d at 856-60. As Bayliner argues, however, it is Graybar's definition of "economic loss", which does not follow *East River's* analysis, that creates a conflict between the state and federal remedies. This conflict requires application of the federal admiralty rule of *East River. See Offshore Logistics, Inc. v. Tallentire, supra; Pacific Merchant Shipping Ass'n v. Aubry, supra.* We hold the Supreme Court's holding in *East River* precludes application of a state remedy insofar as plaintiffs seek recovery for the economic loss of the yachts.[7] *See Sisson v. Hatteras Yachts, Inc.,* 778 F. Supp. 959 (N.D. El. 1991).

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[7]We note, however, that application of the maritime admiralty rule in this case does not affect the holding in *Washington Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) as to land-based product liability actions.

Washington's interest in this matter does not outweigh federal interests in the uniformity of maritime laws. Holding that Washington's definition of "economic loss" should apply in this case, the Court of Appeals concluded that "[w]hatever federal interest in uniformity exists, it is outweighed by Washington's concern to ensure the personal safety of its citizens, to deter the manufacturer and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction." *Bayliner, 68* Wn. App. at 132. Bayliner argues that the state interests articulated by the Court of Appeals do not obviate the need for uniformity in maritime products liability law. We agree.

First, the court need not engage in "interest analysis" where there is a conflict between the state and federal remedies for economic loss; such conflicts are resolved in favor of federal maritime law. *See Tallentire,* 477 U.S. at 222-23. Second, assuming arguendo that there was no conflict of laws, the determination of whether the Graybar rule disrupts federal maritime harmony depends on the balance of federal and state

interests involved. *See Aubry*, 918 F.2d at 1424 (citing *Kossick*, 365 U.S. at 741-42). Washington's interest in providing a remedy for these plaintiffs does not outweigh federal interests in maritime uniformity.

In *Berg v. General Motors Corp.*, 87 Wn.2d 584, 591-96, 555 P.2d 818 (1976), this court adopted a minority view with respect to the meaning of "economic loss" and held that a purchaser of a defective engine for a fishing boat could recover from the manufacturer lost profits for the fishing season that resulted from the defective engine. The Legislature overruled Berg and adopted the analysis of the California Supreme Court in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965),[8] when it enacted the 1981 products liability act. Talmadge, *Product Liability Act of 1981: Ten Years Later*, 27 Gonz. L. Rev. 153, 168-69 (1991-1992). *See also Graybar*, 112 Wn.2d at 857-58. The preamble to the 1981 act states in part:

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[8]In *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), the court denied recovery to a plaintiff who had pleaded lost profits as the only damages under a negligence theory.

> It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with [problems associated with rising premiums for product liability insurance].
>
> It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

Laws of 1981, ch. 27, § 1. *See also Talmadge, Washington's Product Liability Act,* 5 U. Puget Sound L. Rev. 1 (1981). In reaching an appropriate "balance", the Legislature specifically excluded from the WPLA recovery for economic loss in tort, deterring such claims instead to the UCC. *See* RCW 7.72.010(6); RCW 7.72.020(2). In the tort reform act of 1986, the Legislature

again noted the social costs associated with liability insurance and stated "it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for *persons injured* through the fault of others is available." (Italics ours.) Laws of 1986, ch. 305, § 100. Washington does have an interest in preserving appropriate remedies for personal injury; the loss at issue in this case, however, is purely economic.

The *Graybar* court, however, found *East River's* approach to economic loss unsuited to what the Legislature intended under the WPLA. *Graybar,* 112 Wn.2d at 864. *See also Stuart v. Coldwell Banker Comm'l Group, Inc.,* 109 Wn.2d 406, 417-22, 745 P.2d 1284 (1987) (indicating support for risk of harm analysis). The *Graybar* court carefully analyzed the statute and concluded that the WPLA incorporates the "risk of harm" analysis. *Graybar,* 112 Wn.2d at 866. However, there is no indication by the Legislature or this court that Washington's interests in deterring the manufacture and dissemination of dangerous products outweigh

the need for a uniform maritime law of products liability. Indeed, the *Graybar* court acknowledged that the Supreme Court in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986) exercised its authority to determine the substantive admiralty law. *Graybar,* 112 Wn.2d at 861-62. As Bayliner argues, there is no support for a rule of exception for economic loss in maritime products liability cases based on Washington law.

The adherence to uniformity in maritime law is evident in recent federal case law. The Supreme Court in *Sisson v. Ruby,* 497 U.S. 358, 367, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1989) extended the analysis in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982) beyond the rules of navigation to state that other rules of maritime liability should be uniform between commercial and noncommercial vessels: "The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial."

In *Texaco Ref & Mktg., Inc. v. Estate of Tran*, 808 S.W.2d 61 (Tex. Sup. Ct.), *cert. denied*, 116 L. Ed. 2d 245 (1991), the court determined whether survivors of a man who was killed in a maritime incident were entitled to damages for mental anguish and loss of society, which are not recoverable under general maritime law. The court applied the criteria of *Sisson v. Ruby, supra,* for maritime jurisdiction and held that "[where general maritime law is properly invoked ... a trial court's failure to award damages consistent with maritime law is clearly reversible error." *Texaco Ref & Mktg., Inc.*, 808 S.W.2d at 64.

The court emphasized that general maritime law preempts state causes of action and remedies, consistent with the "longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction". *Texaco Ref & Mktg., Inc., supra* at 64 (citing *Foremost*, 457 U.S. at 676-77; *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 91 L. Ed. 2d 174, 106 S. Ct. 2485 (1986)); *accord, Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087-88 (2d Cir. 1993) (federal

maritime law, whether or not it conflicts with state law, applies to an action for wrongful death in state territorial waters brought under the admiralty jurisdiction of the federal courts). Likewise, in *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (WD. Mich. 1988), *aff'd in part, revd in part on other grounds,* 894 F.2d 804 (6th Cir. 1990), a case involving the sinking of a private yacht, the court rejected the argument that state products liability law should apply:

> Plaintiffs have raised the argument that because they have access to a remedy under state products liability law, this in some way lessens the federal interest over the controversy. The analysis employed in *Foremost,* however, makes it clear that *the existence of a parallel state remedy is of no consequence.* If a sufficient federal interest exists to justify the exercise of maritime jurisdiction, the application of maritime law will follow as a matter of federal supremacy. See 457 U.S. at 674-75, 102 S.Ct. at 2658.

(Some italics ours.) Anderson, 692 F. Supp. at 768 n.2; *accord, Karshan v. Mattituck Inlet Marina & Shipyard Inc.*, 785 F. Supp. 363 (E.D.N.Y 1992); *Sisson v. Hatteras Yachts, supra.* In this case, sufficient federal interest exists to justify the exercise of maritime jurisdiction. Consequently, with admiralty jurisdiction comes the application of substantive admiralty law. *East River,* 476 U.S. at 864. *See Zukowsky v. Brown,* 79 Wn.2d 586, 590 n.1, 488 P.2d 269 (1971). There is no persuasive authority to compel a different result in this case.

In summary, federal maritime law preempts application of a conflicting state law where there is a judicially fashioned admiralty rule on point. *East River* is the maritime rule on economic loss. To the extent that *Washington Water Power Co. v. Graybar Elec. Co., supra,* is read to conflict with *East River,* the federal admiralty rule controls. *Graybar* is controlling as to land-based product liability claims. Even considering "interest analysis", there is no authority to indicate that Washington's interest in product liability law outweighs or displaces federal interests in uniform maritime

law. *See Anderson v. Whittaker Corp.*, 692 F. Supp. at 767 (there is strong federal interest in providing uniform standards for the design and manufacture of products that have the potential to affect traditional maritime activities).

CONCLUSION

The plaintiffs' claims arise under admiralty jurisdiction. We hold, therefore, that substantive admiralty law precludes recovery for economic loss. Plaintiffs' remedy, if any, for economic loss to the yachts may be pursued in warranty against the seller under the UCC (RCW 62A). We reverse the Court of Appeals and remand for further proceedings consistent with this opinion.

ANDERSEN, C.J., AND DOLLIVER, DURHAM, AND MADSEN, JJ., concur.

UTTER, J. (dissenting) - I dissent. The majority reasons that state law will control "'in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.'" Majority, at 82 (quoting *Bohemia, Inc. v. Home Ins. Co.*, 725 P.2d 506, 510 (9th Cir. 1984)). There is no assertion that a federal statute is involved. Thus, the only

questions at issue in this case are whether a judicially fashioned admiralty rule conflicts with state law and whether application of state law will jeopardize uniformity in admiralty law in such a way as to void its applicability. Since the answer to both questions is no, I would hold that noncommercial plaintiffs in admiralty are not prevented under federal admiralty law from recovering under the Washington products liability act (WPLA) for the value of a product itself when a defect in the product endangers people and damages property other than the product itself.

The majority's holding proceeds first on the mistaken premise that federal and state law conflict. They do not. Both laws permit recovery in product liability for the value of a purchased product where the transaction is of a non- commercial nature and the product endangers people and damages property other than the product itself.

In Washington, the WPLA governs product liability claims. RCW 7.72. The WPLA imposes liability on manufacturers where a claimant's "harm" is proximately caused by a manufacturer.

RCW 7.72.030. "Harm" does not include direct or consequential "economic loss". RCW 7.72.010(6). By adopting a narrow definition of "economic loss", the court *in Washington Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) unanimously preserved the right of consumers to treat damage to a product itself as compensable "harm" under the WPLA if the damage does not constitute "economic loss" as determined by a "risk of harm" analysis. Risk of harm analysis looks to the nature of the defect, the type of risk, and the manner in which the injury arose. *Graybar,* 112 Wn.2d at 861. The majority concedes that state law might afford the Stantons and Henry recovery under the WPLA.

The majority asserts that despite the otherwise controlling effect *Graybar* would have on land-based actions, majority at 87, *Graybar* should not apply in cases involving federal admiralty jurisdiction. The majority's holding is premised on a misapprehension of the scope of *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 90 L. Ed. 2d 865, 106 S.

Ct. 2295 (1986). It improperly views the Court of Appeals decision as creating an "exception" to the *East River* rule. Majority, at 79. Under the guise of merely applying *East River's* holding, the majority in fact *expands East River.* By doing so it artificially creates a conflict between state and federal admiralty law where none exists.

The majority extends *East River* in two significant ways. First, it extends the *East River* doctrine to noncommercial relationships. The plain holding of *East River* is as follows: "a manufacturer in a *commercial relationship* has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself". (Italics mine.) *East River,* 476 U.S. at 871. The reasons for distinguishing between commercial and noncommercial relationships for liability purposes have been widely acknowledged. The *East River* Court itself reasoned "the *commercial user* stands to lose the value of the product, *risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service.*"

(Italics mine.) *East River,* 476 U.S. at 871.[9] The plaintiffs currently before the court are consumers who bought their yachts in noncommercial transactions for the demonstrated purpose of pleasure boating, not for transporting cargo or for otherwise performing commercial services.[10] Furthermore, Bayliner, the manufacturer of the yachts, is alleged to manufacture and design

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[9]*See also East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858,' 873, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986) (citing *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960)); *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499 (D. Md. 1990); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* § 101, at 708 (5th ed. 1984), at 98 (Supp. 1988); Bungert, *Compensating Harm to the Defective Product Itself - A Comparative Analysis of American and German Products Liability Law, 66* Tulane L. Rev. 1179, 1249-51 (1992); Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort,* 44 U. Miami L. Rev. 731, 75456 (1989-1990).

[10]Although one of the purchasers was a corporate entity, there was no evidence the purchase was part of a commercial relationship. The touchstone of whether a transaction is "commercial" is not whether a purchaser is a corporate entity but rather whether the transaction involves commercial attributes, including relatively proportionate bargaining power. *See generally East River,* 476 U.S. at 872-73. Additionally, I disagree with the majority's implication that the presence of insurers is of consequence in bringing this case within the scope of *East River.* The insurers possessed neither bargaining power regarding the purchase of the yachts nor commercial use for the yachts.

such yachts for recreational use. Clerk's Papers, at 145. The holding of *East* River therefore does not apply to this case.

Various cases are cited by the majority to support its holding that *East River* should be extended to noncommercial cases. Majority, at 76-79. These decisions are not controlling, as they are holdings from other jurisdictions. Furthermore, at least one court has recognized that *East River* does not extend to noncommercial relationships. See *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499 (D. Md. 1990) (concluding that because the plaintiffs and the defendant were not in a commercial relationship, the *East River* rule did not preclude a claim in tort).

The majority inappropriately extends *East River* in a second significant manner by extending *East River* to scenarios involving grave risk to people and damage to property other than the product itself. In *East River,* neither people nor other property was injured or even endangered. Indeed, the *East River* Court expressly noted "[i]n the traditional 'property damage' cases, the defective product damages other property. In this case, there was

no damage to 'other' property." *East River,* 476 U.S. at 867. *East River* therefore does not categorically prohibit recovery for damage to a product itself. The court neither formulated a principle nor expressed an opinion on the proper rule for cases involving injury or risk to people and property other than the product itself. Therefore, federal and state law do not conflict, and state law will control if it does not excessively jeopardize federal harmony.

Here the majority commits its second error, concluding that even if there were no conflict of laws, the federal interest in uniformity outweighs the state interest in permitting recovery where risk of harm analysis deems injury to a product itself to be noneconomic.

The need for uniformity requires a balancing of federal interests against state interests. However, "[t]he Constitution tolerates some disharmony in admiralty law ... states may supplement admiralty law, and states' supplementation of admiralty law necessarily creates some discord in that law". *Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409, 1424 (9th Cir. 1990).

Accordingly, the balancing test should be applied in order to determine whether the state law "*unduly disrupts* harmony in the federal admiralty system." *Pacific Merchant,* 918 F.2d at 1424.

Critical to this balancing test is an identification of some degree of uniformity in federal admiralty law against which state interests can be measured. However, the courts sitting in admiralty are themselves split regarding whether noncommercial plaintiffs may recover for the value of a product itself if people are not endangered and no property other than the product itself is damaged. Moreover, courts in admiralty are silent as to whether plaintiffs, whether noncommercial or commercial, can recover for the value of a product itself when people are endangered and property other than the product itself is damaged. In this context, it is inappropriate for the court to claim that recognition of the state remedy would disrupt federal uniformity.

In an attempt to identify a uniformity in federal law against which state interests must be unfavorably examined, the majority asserts that commercial and noncommercial vessels must be

treated uniformly under admiralty law. Majority, at 86. The law it cites for this proposition, however, does no more than hold that commercial and noncommercial ships must be treated identically for the purpose of determining whether a case is subject to admiralty jurisdiction. *See Sisson v. Ruby,* 497 U.S. 358, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1990); *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982). The rules governing jurisdiction are not the same as those governing the application of substantive law. *See Bell v. Hood,* 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946). To the extent *Sisson* and *Foremost* might encourage courts to treat commercial and noncommercial relationships identically for purposes of substantive law, such viewpoint is dicta and, as such, not controlling. The federal interest in uniformly denying recovery to noncommercial plaintiffs whose lives were endangered and who suffered damage to property other than the product itself is nonexistent, and the need to preserve an alleged uniformity in admiralty law is thus weak at best.

Juxtaposed against this silence in federal law is a clearly articulated state interest in favor of recognizing a possible WPLA claim in this context. As the Court of Appeals noted:

> Whatever federal interest in uniformity exists, it is outweighed by Washington's concern to ensure the personal safety of its citizens, to deter the manufacture and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction. The WPLA, whose very application is at issue in this case, itself attests to those interests.

Stanton v. Bayliner Marine Corp., 68 Wn. App. 125, 132, 844 P.2d 1019 (1992). Since state law does not interfere with the uniform application of admiralty law, I would agree with the Court of Appeals that our state's interests outweigh the interest in an alleged uniformity in federal admiralty law and that Washington law should apply.

There is no conflict between federal admiralty law and state law on the facts of these consolidated cases. Neither does the

need for a uniform federal admiralty law outweigh the state interest in recognizing a claim involving endangerment of human life and damage to property other than the product itself. The rule in *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989) thus applies and the Court of Appeals should be affirmed. I would remand the case for a determination of whether the Stantons and Henry state a claim under the WPLA and the risk of harm approach adopted by *Graybar*. Because there is no need to consider whether commercial or noncommercial plaintiffs in admiralty are prevented by federal admiralty law from recovering under the WPLA where life and property were neither injured nor endangered, I do not reach those issues.

BRACHTENBACH, SMITH and JOHNSON, J.J., concur with UTTER, J.

FILED
MAR 10 1994

THE SUPREME COURT OF WASHINGTON

JAMES H. STANTON, ET AL., Respondents,	)	
v.	)	No. 60031-7
BAYLINER MARINE CORPORATION, Petitioner.	)	ORDER DENYING MOTION FOR RECONSIDERATION
ALBANY INSURANCE COMPANY, Respondent,	)	
v.	)	
BAYLINER MARINE CORPORATION, Petitioner.	)	

FOR RECONSIDERATION

The Court having decided that the respondents' motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

Dated this 10th day of March 1994.

/S/
Chief Justice

123 Wn.2d 64

DATED
MAR 14 1994

THE SUPREME COURT OF WASHINGTON

JAMES H. STANTON, WINNIFRED STANTON, and their marital community, et al.,

Respondents,

v.

BAYLINER MARINE CORPORATION, a Delaware corporation,

Petitioner,

OLYMPIA SALES, INC., d/b/a Olympic Boat Centers, a Washington corporation,

Defendant.

ALBANY INSURANCE COMPANY, a Washington corporation,

Respondent,

v.

MANDATE

No. 60031-7

King County
No. 882213682

C/A No. 27275-6-I

BAYLINER MARINE CORPORATION, a Delaware corporation,

Petitioner,

OLYMPIC SALES, INC., d/b/a Olympia Boat Centers, a Washington corporation,

Defendant.

THE STATE OF WASHINGTON TO:

The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on December 30, 1993, became the decision terminating review of this Court in the above entitled cause on March 10, 1994. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs will be taxed by Supplemental Judgment.

Order Denying Motion for Reconsideration was entered herein on March 10, 1994. Copy attached.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set may hand and affixed the seal of said Court at Olympia, this 14th day of March, 1994.

/S/
RONALD R. CARPENTER
Deputy Clerk of the Supreme Court,
State of Washington

cc: Mr. Joseph Fischnaller
Mr. Dexter Washburn
Mr. Newell Smith
Mr. Dennis Ostgard
Mr. Jerome Scowcroft
Court of Appeals, Div. I
Reporter of Decisions

(3)

Supreme Court, U.S.
FILED
JUL 5 1994
OFFICE OF THE CLERK

No. 93-1980

In The

Supreme Court of the United States

October Term, 1994

JAMES H. STANTON, WINNIFRED STANTON, and their marital community, and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

v.

BAYLINER MARINE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION OF BAYLINER MARINE CORPORATION

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July 1, 1994

24 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent Bayliner submits that the real issues for review are as follows:

1. Is there a conflict between two or more United States Courts of Appeals or any state courts of last resort with respect to Petitioners' principal issue of whether *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) applies to a recreational vessel?

2. Whether this Court should defer to the Washington State Supreme Court's decision that the federal interest in having a uniform maritime law of products liability with respect to the *East River* rule, outweighs any interest the State of Washington may have in applying a conflicting state rule?

3. Is review premature where Petitioners still have a remedy available to them against another party?

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I. INTRODUCTION

Petitioners' first question is whether *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) should apply to recreational vessels. Since *East River* was decided in 1986, only one appellate court (the subject Washington Supreme Court decision) and four reported trial court decisions have directly addressed this issue. Of these cases all but one have decided that *East River* does apply to recreational vessels. Because there is only *one* appellate decision addressing the issue, there is no conflict for this Court to resolve.

In *East River* this Court in effect makes a fundamental policy statement about risk of loss for maritime negligence or products liability actions: absent a contractual modification, the risk of pure economic loss is on the buyer, who is then expected to obtain appropriate insurance protection. In the two subject cases the vessel buyers, with or without explicit bargaining over risk of loss, did procure insurance protection, thereby effectuating the *East River* policy. Thus the anomaly, that the claims at issue here are *subrogation* claims in which the subrogee, Albany Insurance, contends that this court should disregard its presence, ignore the fact that it received a premium for the risk it undertook, repudiate the policy underlying *East River*, and fashion a unique rule of law for the State of Washington, when the Washington Supreme Court has declined to do so. The sole reason given is that both vessels were engaged in recreational uses at the time of their casualties.

Petitioners' second question, whether the Washington Supreme Court erred in ruling that state law is preempted regardless of the balance of state and federal interests, is not before the Court because the Washington Supreme Court did balance state and federal interests and concluded that the federal interest in the uniformity of federal maritime law dominates. This Court should defer to the Washington Supreme Court's assessment that the Washington state interests are not paramount when balanced against federal maritime interests.

Finally, the Petition should be denied because review is premature. Petitioners still have the potential of a full remedy on their warranty claims against the dealer, Olympic Boat Sales, Inc.

II. COUNTER-STATEMENT OF THE CASE

This matter arises out of an affirmance by the Washington Supreme Court of a trial court order granting partial summary judgment in two consolidated suits brought by Albany Insurance on its subrogated interests for monies paid for the constructive total losses of two nearly identical 45-foot yachts, manufactured by Bayliner Marine Corporation (Bayliner).

One of the vessels had been purchased by the Stanton Investment Company, ostensibly for the business purposes of charter service and entertaining clients, and for recreational use by the Stantons. The other vessel was purchased by a private party.

The subject vessels were each involved in groundings at cruising speed (12-15 knots) on well-marked and charted shoals and rocks. One of the groundings occurred in Canadian waters. No one was injured in either incident.

In each case the force of driving the vessel onto rocks tore away or ground-off parts of the skeg keel.[1] Petitioners contend that the keel should have been capped, apparently believing the keel could then be torn away without disturbing the integrity of the hull.

Bayliner's expert witness, a yacht designer, averred that (1) the hull and keel design met industry standards, (2) the design is consistent with the configuration illustrated in the American Bureau of Shipping Classification criteria, (3) the design specifications meet or exceed ABS strength criteria, (4) the configuration serves a useful purpose in providing for drainage and collection of condensate, spills, and unwanted liquids inside the hull, and (5) the design does not present a danger to reasonable and foreseeable use.

Both casualties occurred relatively close to shore and in both cases the passengers were evacuated before the vessels became submerged. According to Coast Guard records, it took the Stanton vessel 27 minutes to partially sink, with the Stantons having been transferred within 12 minutes of the initial report of grounding. The other vessel never did sink because it was firmly grounded on

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[1] The skeg keel is an integrally-molded portion of the vessel's one-piece fiberglass hull extending a maximum depth of 14 inches below the bottom of the hull; it is approximately 7 inches wide. The interior space formed by the skeg keel serves as a sump for the bilge pumps.

a rock ledge. Though the owners and their passengers were evacuated by helicopter, they could have safely waited until the completion of the ebbing tide and then walked to shore.

Albany brought suit on its subrogation interests as the insurer for the two vessels. The suits alleged negligence, products liability, and breach of warranty against Bayliner and the dealer, Olympic Boat Sales, Inc. (Olympic Boat), for allegedly manufacturing and selling vessels that could not survive being run hard aground without incurring serious flooding as a result of damage to the keel.

III. REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between Any Federal or State Appellate Courts on Petitioners' Principal Issue of Whether *East River* Applies To Non-Commercial Vessels.

This case is neither of national importance nor is it ripe for review by this Court. The court below is the only appellate court to decide whether *East River* should apply to non-commercial vessels.

As a practical matter the issue of whether to apply *East River* to a recreational vessel most often, if not always, arises in the context of a subrogation claim by the insurance carrier of an expensive yacht. The economics of damages to smaller vessels such as ski or "bass" boats will not support such litigation because of the relatively small monetary amounts involved. Not unsurprisingly, the specific issue presented to the Court for review has

been reported in court proceedings on only five occasions and has not been presented to any federal court of appeals nor has it come before any state court of last resort with the exception of the Washington State Supreme Court.

With one exception, the courts that have specifically addressed the issue of whether *East River* applies to recreational vessels have uniformly held that the reasoning underlying the *East River* decision applies equally to commercial and consumer situations and have applied the *East River* holding to recreational vessels. *Karshan v. Mattituck Inlet Marina and Shipyard, Inc.*, 785 F. Supp. 363 (E.D.N.Y. 1992); *Sisson v. Hatteras Yachts, Inc.*, 1991 W.L. 47543 (N.D. Ill. 1991), 778 F. Supp. 959 (N.D. Ill. 1991); *Lewinter v. Genmar Industries, Inc.*, 1993 AMC 939 (Cal. Super. Ct. 1993); *see also, Betancourt v. W. D. Schock Corp.*, 907 F.2d 1251, 1255 (1st Cir. 1990) (applied *East River* to sailboat re: statute of limitations); *Simone v. Genmar Industries*, 1989 AMC 2627 (S.D.N.Y. 1989) (in *dicta* stated that *East River* applied to a recreational vessel); *contra, Sherman v. Johnson & Towers Baltimore Inc.*, 760 F. Supp. 499 (D. Md. 1990). In addition to these maritime cases, the Washington Supreme Court also cited three land-based cases that held that *East River* applies to consumer products. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1200 (Del. 1992); *Waggoner v. Town and County Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990); *Dairyland Ins. Co. v. General Motors Corp.*, 549 So.2d 44 (Ala. 1989); *accord, Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993) (decided after the Washington Supreme Court opinion).

Petitioners inaccurately contend that there are four cases which have held that *East River* should not apply to

non-commercial vessels. Only in *Sherman, supra,* was the court specifically asked to apply *East River* to a non-commercial vessel. The other three opinions cited by Petitioners deal with plaintiffs engaged in commerce and discuss *East River*'s application to non-commercial products only in *dicta*.[2] Only *Employers Ins.* involves maritime facts. Of the cases cited by Petitioners, only *Sherman* is on point and adopts their theory that *East River* should apply exclusively to commercial vessels.

The only appellate court which has directly addressed the specific issue of whether to apply *East River* to a recreational vessel is the Washington Supreme Court. The only conflicting opinion on point is the district court opinion in *Sherman, supra.* The only contrary appellate decision is *Employers Ins., supra,* which is inconsistent only in *dicta.* To justify the grant of certiorari there should be a real conflict on the same matter of law or fact, "not merely an inconsistency in *dicta* or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* § 4.3, p. 167 (7th ed. 1993). Because there is no conflict amongst the appellate courts, certiorari should not be granted.

B. The Court Need Not Reach Petitioners' Second Issue of Whether the State and Federal Interests Should be Balanced in Resolving Conflicts Between State and Maritime Law.

Petitioners at page 32 state their second issue: "The Washington Supreme Court erred in ruling that state law

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[2] *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.,* 866 F.2d 752 (5th Cir. 1989); *Richard O'Brien Companies v. Challenge-Cook Bros., Inc.,* 672 F. Supp. 466 (D. Colo. 1987); *Consumers Power Co. v. Mississippi Valley Struc. Steel Corp.,* 636 F. Supp. 1100 (E.D. Mich. 1986).

is preempted without the need to balance state and federal interests."

This issue need not be reached because the Washington Supreme Court did specifically balance the respective federal and state interests, stating:

> . . . assuming arguendo that there was *no* conflict of laws, the determination of whether the *Graybar* rule disrupts federal maritime harmony depends on the balance of federal and state interest involved. (Citations omitted) Washington's interest in providing a remedy for these plaintiffs does not outweigh federal interests in maritime uniformity. A-59, A-60.

The Washington Supreme Court detailed the basis of its reasoning. The court engaged in statutory interpretation of the Washington Product Liability Act (RCW 7.72), observing that it was the intention of the Washington State legislature to provide a remedy for personal injuries and to protect businesses located in the State of Washington "from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation." A-61-A-63. The court recognized that there was a state interest in protecting a manufacturer and a lessened state interest to protect the consumer from purely property loss. The court also acknowledged that it had recognized the *East River* decision as being the admiralty rule in *Washington Water Power Co. v. Graybar*, 112 Wn.2d 847, 774 P.2d 1199 (1989), and that neither legislative action nor its prior decisions would support a finding that Washington's interest in deterring the manufacture and dissemination of dangerous products

outweighs the need for a uniform maritime law of products liability. *Id.*

The Washington Supreme Court also examined the extent of the federal interests in a uniform maritime rule. In doing so, the court appropriately reviewed *Sisson v. Ruby*, 497 U.S. 358 (1989) and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) in which this Court found maritime jurisdiction in actions involving recreational vessels in order to further the uniformity of rules of maritime liability as between commercial and non-commercial vessels. A-63. The Washington Supreme Court quoted *Sisson v. Ruby* as stating "the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial." *Sisson v. Ruby, supra*, 497 U.S. at 367. A-63. The court also cited *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 767 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990) for the policy consideration that "there is a strong federal interest in providing uniform standards for the design and manufacture of products that have the potential to affect traditional maritime activities." A-67. After carefully reviewing this Court's and lower federal court opinions addressing the need for uniformity of maritime law, the Washington Supreme Court concluded that federal interests in having a uniform economic loss rule for maritime products liability outweighed any relevant state interests. A-63-A-67.

The Washington Supreme Court did engage in the "interest analysis" that Petitioners have asked for and concluded, based on its interpretation of the Washington Product Liability Act, prior federal and Washington state court opinions and public policy considerations, that Washington's interests do not predominate over the federal maritime interests involved. Because the Washington Supreme Court did balance state and federal interests, this Court need not reach the issue of if and when "interest analysis" is indicated and should defer to the Washington Supreme Court's own assessment of its state's interests, particularly where the Washington court concluded that the federal interests predominate.

C. The Issues Are Not Sufficiently Important to Warrant this Court's Attention.

The issue of whether or not *East River* should apply to recreational vessels has arisen in only five reported decisions, despite the fact that there are over 16 million recreational vessels in the United States.[3] Because most recreational vessels are insured or do not have sufficient value to warrant litigation, typically the few cases that actually come before the courts involve large expensive yachts. *See, e.g., Karshan, supra* ($480,000, 50-foot Chris-Craft which sustained $90,000 in damage); *Lewinter v. Genmar Industries, supra* (61-foot motor yacht); *Simone v.*

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[3] M. Harrington, *Almost Full Circle: Admiralty Jurisdiction Over Pleasure Craft, Journal of Maritime Law & Commerce*, Vol. 24, No. 3 (July 1993) 453, 498 n.259, referencing Statistical Abstract of the United States, Nos. 395, 397 and 989 (1992).

Genmar Industries, supra ("large motor yacht"); *Sherman v. Johnson, supra* ("yacht").

With respect to recreational vessels being covered by insurance, *Karshan* observed:

> . . . in a maritime context, vessel owners can, and generally do, insure against losses to the value of the vessel, *see* [*East River*, 476 U.S.] at 871, 106 S. Ct. at 2302, and . . . "(s)ociety need not presume that a customer needs special protection" *id.* at 871-872, 106 S. Ct. at 2302. Indeed, in the instant case Karshan is insured and, except as to its deductible, the real plaintiff in interest is his insurance carrier. "The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *Id.* at 872, 106 S. Ct. at 2302. *Karshan*, 785 F. Supp. at 366.

Sisson v. Hatteras, supra, involved a 56 foot Hatteras motor yacht. The suit was brought as a subrogation action by American Home Assurance Company. The court, recognizing that under *East River* there was no tort claim for economic losses to the vessel itself, stated:

> There is no reason to believe that he would not be able to pursue whatever contractual remedies he may have against the seller for economic losses due to the destruction of the ULTORIAN or that he was not otherwise protected by insurance. *Sisson v. Hatteras, supra*, 1991 W.L. 47543 at p. 2.

The two vessels which are the subject of this action were both 45 foot Bayliner yachts, each costing well over $200,000. Both vessels were insured by Albany Insurance.

Petitioners' principal issue of whether the *East River* economic loss rule applies to recreational vessels arises infrequently and usually, if not always, in the context of expensive yachts, whose owners have insurance and other remedies under breach of contract or warranty causes of action against the dealer. The few recreational vessel cases where the issue of the application of *East River* does arise, do not warrant the attention of this Court, particularly where there has not yet been a conflict between any appellate courts.

D. Review is Premature Because Petitioners Still Have a Remedy for their Warranty Claims Against the Dealer.

Petitioners' actions were brought against both Bayliner and the dealer who sold the owners their boats, Olympic Boat. The subject opinion recognizes that Petitioners can still pursue their remaining warranty claims against Olympic Boat at trial. A-28 n.1, A-29, A-67.

This Court has observed that for certiorari to be granted the underlying judgment "should be final not only as to all parties, but as to the whole subject matter and as to all causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920).

The only exception that might apply is:

> . . . [w]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non federal grounds, thus rendering unnecessary review of

> the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceeding still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federally policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation. *Flynt v. Ohio*, 451 U.S. 619, 621, 622 (1981).

However, here, as in *Flynt*, there is "no identifiable federal policy that will suffer if the state . . . proceeding goes forward." *Flynt*, 451 U.S. at 622. Rather, the identifiable federal interest is in the uniformity of maritime law, which is served by denying certiorari.

Although the parties did stipulate to the finality of the trial court's decision for purposes of state court appellate review, the test is not whether under local rules of practice the judgment is final, rather whether the record shows that the adjudication is sufficiently final to warrant the exercise of this Court's jurisdiction. *See* R. Stern, *Supreme Court Practice*, § 3.3, pgs. 93-94.

E. Petitioners Misstate the Law When They Suggest That There is no Strong Federal Interest in the Uniformity of Maritime Products Liability Law.

Petitioners at pages 51-54 suggest that because a contract for the construction of a vessel is non-maritime

and subject to state law, there is no strong interest in the uniformity of maritime product liability law. To the contrary, *East River* observed that state law only extends to a plaintiff's breach of warranty action. *East River*, 476 U.S. at 872, 872 n.7. The decision makes it very clear that in a maritime action grounded upon negligence or products liability, federal maritime law applies. Even though a maritime plaintiff's breach of contract and warranty claims are governed by state law, concerns for uniformity and federal supremacy require that maritime tort claims for negligence and products liability be governed by federal maritime law.[4]

F. The Rationale of *East River* is not Limited to Commercial Cases.

Petitioners rely upon two principal arguments for the proposition that *East River* should be limited to vessels that are engaged in commercial service: (1) *East River's* repeated use of the word "commercial" and (2) a perceived inequality in bargaining power between recreational vessel purchasers and boat manufacturers.

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[4] *East River, supra; accord, Ingram River Equipment v. Pott Ind.*, 816 F.2d 1231 (8th Cir. 1987); *In Re Amoco Cadiz*, 699 F.2d 909, 914 (7th Cir. 1983); *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171, 174 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *Delta Marine v. Whaley*, 813 F. Supp. 414 (E.D.N.C. 1993); *Anderson v. Whittaker*, 692 F. Supp. at 768, 768 n.2; *Complaint of American Export Lines, Inc.*, 620 F. Supp. 490, 513, 514 (S.D.N.Y. 1985); *Best v. Honeywell Inc.*, 491 F. Supp. 269, 271 (D. Conn. 1980), *aff'd*, 679 F.2d 872, 874 (2d Cir. 1981).

Though *East River* does use the term "commercial," the decision does not confine its rationale to commercial facts nor is there any persuasive argument provided that would justify limiting its application to commercial cases. Rather, as explained by the Washington Supreme Court, the *East River* policy concerns apply equally well to consumer cases. The court observed that the primary considerations in *East River* were to separate tort and contract actions, and that the vessel owner can and typically does further protect himself by insurance, both considerations apply equally to recreational vessels. A-46. The court also recognized the problems inherent in trying to make distinctions between commercial and non-commercial situations. A-49, A-51; *see Foremost*, 457 U.S. at 675-676.[5]

Before this appeal, Petitioners' counsel of record, Mr. Scowcroft, in reviewing *Sisson v. Ruby, supra*, in part explained the references in *East River* to the vessels being in "commerce" as establishing the maritime nexus necessary for federal maritime jurisdiction. J. Scowcroft, Case Notes, *Journal of Maritime Law and Commerce*, Vol. 22, No. 2 (April, 1991), 299, 305-306.

Petitioners' second contention that there may be unequal bargaining power between recreational vessel buyers and manufacturers is inapplicable to this case. Such an analysis applies only in situations where a large disparity in bargaining power creates overreaching contract provisions. *Henningsen v. Bloomfield Motors, Inc.*, 32

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[5] Petitioners' suggestion at pp. 11 and 23 that recreational vessels are analogous to automobiles, was argued by the dissent and rejected by the majority in *Foremost*. *See Foremost*, 457 U.S. at 682, 682 n.7.

N.J. 358, 161 A.2d 69 (1960). Here there are no allegations that Bayliner is seeking to enforce any unconscionable contract terms nor is there any suggestion of industry-wide overreaching in the setting of warranty provisions. On the contrary, there is a large variety of different recreational vessel manufacturers and dealers with whom a buyer can shop to obtain his best terms. Moreover, in this case, the owners each had a one year express warranty on their vessels, and each was able to secure insurance.

Petitioners at pages 11 and 27 indulge in the sweeping generality that recreational vessels owners do not have the sophistication or bargaining power to negotiate warranties or to evaluate their risks of property loss. To the contrary, yachts of a sufficient value to warrant litigation for solely property loss range in value from approximately $100,000 to millions of dollars. (*See* discussion *infra* at 9, 10).[6] In the context of these expensive yachts the owners have an equal ability to protect themselves when compared to buyers of commercial vessels, both in shopping for and negotiating warranties and in adequately insuring their vessels against property damage. Many of the larger yachts are custom built, where all of the contract provisions would be specifically negotiated.

A case of significance for the analysis in *East River, Seely v. White Motor Company*, 45 Cal.Rpt. 17, 63 Cal.2d 9, 403 P.2d 145 (1965), distinguished the concern for the potential of unequal bargaining power as can be done in this case:

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[6] Several Washington yards specialize in building expensive luxury yachts; a recently completed yacht cost over $21 million.

> Unlike the defendant in *Henningsen* (citation omitted) White is not seeking to enforce an industry-wide disclaimer of liability for personal injuries. Here, plaintiff, whose business is trucking, could have shopped around until he found the truck that would fulfill his business needs. He could be fairly charged with the risk that the product would not match his economic expectations, unless the manufacturer agreed that it would. *Seely*, 403 P.2d at 151, 152.[7]

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[7] The reasoning adopted by the *Seely* case further demonstrates the logic of not limiting *East River* to commercial situations:

> He (manufacturer) cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He (consumer) can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries, and there is no recovery for economic loss alone. *Seely*, 403 P.2d at 151, citing *Wyatt v. Cadillac Motor Car Division*, 145 Cal. App. 2d 423, 302 P.2d 665 (1956) (a consumer action involving complaints about a personal automobile).

G. A Unique Washington Maritime Rule of Economic Loss, Applicable Only to Recreational Vessels, Would Interfere With the Uniform Maritime Legal System and Unfairly Prejudice Washington Boat Manufacturers.

If this Court were to grant the relief Petitioners ask for and hold that the State of Washington should have a unique rule governing economic loss for non-commercial vessels,[8] there would be a direct affect on Bayliner in its ability to compete with out-of-state manufacturers. Bayliner and other State of Washington manufacturers could be sued in Washington state for greater products liability exposures than their competitors situated in other states or countries, thereby increasing their costs. Such a unique Washington rule would also have the effect of impermissibly encouraging forum shopping. *See, Pope & Talbot v. Hawn*, 346 U.S. 406, 411 (1953); *Butler v. American Trawler*, 707 F. Supp. 29, 31 (D. Me. 1989) *aff'd*, 887 F.2d 20 (1st Cir. 1989).

The issue of recovery for economic loss in products liability cases involving non-commercial vessels is not "peculiarly a matter of state and local concern." *Kossick v.*

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[8] The "risk of harm" test that Petitioners seek to apply is a minority view which has not been adopted in any maritime cases. *See Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, ___ F.3d ___, 1994 W.L. 178134 n.2 (10th Cir. 1994); *Casa Clara*, 620 So.2d at 1245 n.2. The principal case relied upon by the Washington Supreme Court in *Graybar, supra*, in adopting the risk of harm test, *Pennsylvania Glass Sand v. Caterpillar Tractor*, 652 F.2d 1165 (3d Cir. 1981), has been overruled. *Aloe Coe v. Clark Equipment*, 816 F.2d 110 (3d Cir. 1987) *cert. denied*, 484 U.S. 853 (1987); *see Rem Cole Co. v. Clark Equipment*, 386 Pa. Super. 401, 563 A.2d 128 (1989).

United Fruit Co., 365 U.S. 731, 741 (1961). Bayliner boats and yachts are distributed throughout the world. Recreational vessels, like the two involved here, routinely travel in the Pacific Northwest between Washington, Oregon and Canada (one of the two subject vessels grounded in Canada). They also travel from other locations in the United States to Mexico, the Caribbean and Canada and state to state on the Western and Eastern seaboards, Chesapeake Bay, Gulf of Mexico, Great Lakes, and on the Mississippi River. As an example, the yacht in *Lewinter, supra,* sustained its hull failure in waters off Jamaica. Because of the high mobility of recreational vessels and their potential effect on maritime commerce, it is necessary to have uniform rules of maritime tort liability. *Sisson v. Ruby, supra; Foremost, supra.*

IV. CONCLUSION

Certiorari should be denied because (1) there is no conflict between the federal circuit courts of appeals or state courts of last resort, (2) this Court should defer to the Washington Supreme Court's subordination of its own state interests to the federal need for uniformity of maritime tort law, (3) certiorari is premature because the warranty remedies against the dealer have not yet been resolved, and (4) the Washington State Supreme Court carefully analyzed the applicable law and made the right decision.

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
JUL 27 1994
OFFICE OF THE CLERK

No. 93-1980

In The

Supreme Court of the United States

October Term, 1994

JAMES H. STANTON, WINNIFRED STANTON, and their marital community, and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

v.

BAYLINER MARINE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

FIRST SUPPLEMENTAL BRIEF IN OPPOSITION OF BAYLINER MARINE CORPORATION

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July 27, 1994

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NEW AUTHORITY

Two additional opinions have applied the economic loss rule of *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) to recreational vessels.

In *Somerset Marine, Inc. v. Forespar Products Corporation*, 1994 A.M.C. 1577 (C.D. Cal. 1994) a yacht's mast broke, resulting in $100,000 in damages. Suit was brought by the subrogated insurance carrier. The *Somerset* court granted a defense motion for summary judgment holding that the *East River* rule, barring recovery for a product's damage to itself, applies both to commercial and recreational vessels.

The California Court of Appeals in *Lewinter v. Genmar Industries, Inc.*, ___ Cal. Rptr. 2d ___, 1994 W.L. 380705 (Cal. App. 2 Dist. 1994) affirmed a summary judgment for the defendant manufacturer of a 61-foot motor yacht, based on the application of the *East River* rule. The subject opinion, *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 866 P.2d 15 (Wash. 1993) A-24-77, was cited along with *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) and *Karshan v. Mattituck Inlet Marina and Shipyard, Inc.*, 785 F. Supp. 363 (E.D.N.Y. 1992), for the holding that the "*East River* doctrine is equally applicable to commercial and consumer situations." *Lewinter*, 1994 W.L. 380705 at p.4. The underlying *Lewinter* trial court decision had been reported in American Maritime Cases, *Lewinter v. Genmar Industries, Inc.*, 1993 A.M.C. 939 (Cal. Super. Ct. 1993), and was relied upon several times in the subject *Bayliner* opinion. A-48, A-49, A-52.

Though the subject Washington Supreme Court opinion remains the only decision by the highest court of a

state or a federal appellate court to directly address the application of *East River* to recreational vessels, *Somerset* and *Lewinter* are further persuasive authority that the rationale adopted by this Court in *East River* should apply in a non-commercial maritime context.

Respectfully submitted,

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